STATE OF MICHIGAN

IN THE SUPREME COURT

RONNIE DANCER and ANNETTE DANCER,

Plaintiffs-Appellees,

v

CLARK CONSTRUCTION COMPANY, INC., a Michigan corporation, and BETTER BUILT CONSTRUCTION SERVICES, INC., a foreign corporation

Defendants-Appellants.

Supreme Court No. 153830

Court of Appeals No. 324314

Kalamazoo County Circuit Court No. 2012-0571-NO

/

DONALD M. FULKERSON (P35785)
Attorney of Counsel for Plaintiffs-Appellees
PO Box 85395
Westland, MI 48185
(734) 467-5620
donfulkerson@comcast.net

DAVID A. PRIEHS (P39606)
Law Offices of David A. Priehs
Attorney for Plaintiffs
30300 Northwestern Hwy, First Floor
Farmington Hills, MI 48334
(248) 932-0100
dap@dpriehspc.com

NATHAN PEPLINSKI (P66596)
Harvey Kruse, PC
Attorneys for Defendant Clark Const
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
npeplinski@harveykruse.com

TYREN R. CUDNEY (P46638)
RON W. KIMBREL (P32786)
Lennon, Miller, O'Connor & Bartosiewicz, PLC
Attorneys for Defendant Better Built
151 S. Rose Street, Suite 900
900 Comerica Building
Kalamazoo, MI 49007
(269) 381-8844
tcudney@lennonmiller.com
rkimbrel@lennonmiller.com

/

PLAINTIFFS-APPELLEES' ANSWER TO DEFENDANT-APPELLANT CLARK CONSTRUCTION COMPANY, INC'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases Cited

Court Rules Cited

Other Authority Cited

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees do not dispute that the Supreme Court has jurisdiction to consider Defendant-Appellant, Clark Manufacturing Company, Inc's application for leave to appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly reversed the trial court's order granting Defendant-Appellant, Clark Manufacturing Company, Inc's, motion for summary disposition, because ample evidence raises a genuine issue of material fact meeting the elements of the common work area doctrine.

Plaintiffs-Appellees state:	Yes.
Defendant-Appellant Clark states:	No.
The trial court states:	No.
The Court of Appeals majority states:	Yes.
The Court of Appeals dissent states:	No.

COUNTER-STATEMENT OF GROUNDS FOR SUPREME COURT REVIEW

Defendant-Appellant, Clark Construction Company, Inc ("Clark"), applies for leave to appeal from the Court of Appeals' April 26, 2016 unpublished, 2-1 decision reversing the Kalamazoo Circuit's September 3, 2014 opinion and order granting Clark's, and co-Defendant-Appellant Better Built Construction Services, Inc's ("BBCS'"), motions for summary disposition. (Clark Appx 1-3).

This case arises from a worksite accident on August 9, 2010, when Ronnie Dancer fell through unsupported and unsecured planking on a scaffold. Mr. Dancer was walking on the scaffold's platform over an eight to ten foot gap where the wood planks were not supported by any bridge or outriggers (metal tubes on which the planks should have rested) and were not secured to prevent instability. One of the unsupported and unsecured planks flipped up, causing his fall. Two weeks earlier, an employee of another subcontractor, electrician Eric Koshurin, nearly fell when an unsecured and unsupported plank over one of the scaffold's eight to ten-foot gaps rose up. Despite repeated notice by Koshurin that the scaffold's planking was hazardous and needed to be secured, Defendants (including the Site Safety and Health Officer who spent most of his time in his trailer looking for another job and running his marijuana business) took no action.

The trial court granted Defendants' motions for summary disposition, ruling that Plaintiffs had not raised a material fact question meeting the third and fourth elements of the common work area doctrine. The Court of Appeals majority reversed.

Clark fails to present grounds for Supreme Court review. The Court of Appeals' decision is not clearly erroneous and does not conflict with precedent. MCR 7.305(B)(5).

At the outset, Clark now argues that Plaintiffs have not met "any" (or "none") of the common work area elements, (Clark application, pp 1, 17) – despite conceding below that

Defendants exercised supervisory and coordinating control over the entire construction site, which included the scaffold through which Plaintiff Ronnie Dancer fell, (Tr 7/21/14, p 27 – Clark Appx 22), meeting the first element; and despite the trial court's correct holding that Plaintiffs have raised a meritorious fact question (through the admissions of Defendants' own representatives) satisfying the second element because the risk presented by use of the scaffold without securing the wood planks and supporting them with bridges and outriggers over the 8-10 foot gap through which Mr. Dancer fell was a "readily observable, avoidable danger," (9/3/14 opinion & order, p 3 – Clark Appx 3).

In addition, although this is a MCR 2.116(C)(10) appeal, requiring consideration of all material facts and reasonable inferences in the light most favorable to the nonmoving parties,[1] Plaintiffs-Appellees ("Plaintiffs"), Clark's application violates MCR 7.305(A)(1)(d) and borders on a vexatious pleading under MCR 7.316(C)(1)(b). Clark avoids and dismisses the extensive record evidence Plaintiffs present raising a material fact question satisfying the four elements of the common work area doctrine. Clark's factually-sanitized application hinges on the untenable arguments that (a) a significant number of workers did not fact the same risk of harm that caused Mr. Dancer's injuries (under element three) because Dancer created and solely faced the risk by improperly placing the scaffold's planks minutes before he fell and not using a fall-protection harness, and (b) the scaffold was not a common work area under element four at the time of the accident because it had been raised above 20-25 feet for a portion of the work by one subcontractor, Dancer's employer.

As the Court of Appeals majority correctly held, after reviewing the entire record, evidence raises a genuine issue of material fact satisfying the "significant number of workers"

[1] *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

and "common work area" elements. Compelling evidence, which Clark improvidently omits, establishes that at least 15 employees of several subcontractors encountered the same risk that caused Mr. Dancer's fall – a risk created by (1) use of the scaffold with a work platform comprised of wood planks that were not supported by bridges and outriggers (but were simply laid across open, 8-10 foot gaps between the Hydro Mobile units), (2) use of planks that were not secured,[2] (3) Dancer did not have to wear a fall-protection devices because he was walking on the scaffold while it was enclosed with a guardrail), and (4) even if a fall-protection device was required, Defendants' knowingly failed to enforce fall-protection rules at the site. The employees who encountered this risk included electrician Eric Koshurin who, as indicated above, nearly fell two weeks before Dancer's accident while walking over a gap on the scaffold when one of the unsecured and unsupported planks rose up. This was the same hazard that caused Dancer's fall.

With this, Clark's contention that no fall risk was present until Mr. Dancer allegedly moved the planks[3] shortly before his accident is patently incorrect. Among other substantial evidence, Clark avoids (and tries to dismiss with misplaced credibility arguments) Koshurin's near fall two weeks earlier due to the same hazardous condition caused by the unsupported and unsecured planks. If Clark was correct that Dancer himself created an entirely new risk just before his accident, then why did Koshurin nearly fall two weeks earlier due to the same dangerous inadequacies in the scaffold's configuration? Clark also omits the concessions of its own superintendent (Shaibly) and expert (Destafney) that use of the scaffold without supporting

[2] As shown below, Clark's and BBCS' own representatives admit that worksite guidelines mandated use of the scaffold manufacturer's bridges and outriggers to support the planks and safety devices to secure them. Clark's repeated argument that only MIOSHA regulations governed is unavailing.

[3] As demonstrated below, there is a material fact question whether, before his fall, Mr. Dancer allegedly repositioned the planks improperly.

or securing the planks was a hazardous condition and that Defendants are at least partially responsible for Dancer's fall. (See below).

Next, Clark mistakenly argues that Mr. Dancer is solely responsible for his injuries because he was not wearing a fall-protection device at the time of the accident. As demonstrated below, Dancer was not required to wear a fall-protection harness because, at the time of his fall, he was walking within the scaffold's enclosure guardrails. Even if fall-protection was required, Clark omits the undisputed fact that Defendants knowingly failed to enforce the six-foot fall-protection rule at this site. Accordingly, the Court of Appeals correctly held that there is a material fact question meeting the requirement that a significant number of workers faced the same risk that caused Mr. Dancer's fall.

The Court of Appeals majority also properly held that the scaffold was a common work area under element four. Michigan law is clear that an area "where the employees of two or more subcontractors will eventually work" constitutes a common work area. *Groncki v Detroit Edison Co,* 453 Mich 644, 663; 557 NW2d 289 (1996). It is unrebutted that, both before and after Dancer's accident, employees of two or more subcontractors used the scaffold with unsupported and unsecured planks across the eight to ten-foot gaps.

Despite this, Clark argues and the trial court held that the scaffold was not a common work area at the time of the accident because, for about a week, employees of one subcontractor (Dancer's employer, Leidal & Hart) used the scaffold after it had been raised above 20-25 feet. This is a spurious, and arbitrary distinction. Undisputedly, any worker above six feet without adequate fall-protection (either through a properly configured scaffold or a harness/lanyard) faces a serious risk of harm. As the Court of Appeals majority recognized, all of the subcontractors who used the scaffold above 10 feet faced the same fall risk presented by the same faulty scaffold construction with unsupported and unsecured planks (and unenforced fall-

protection rules) as Dancer faced at approximately 38 feet. Since the scaffold's basic, hazardous construction remained unchanged, and since, under Michigan law, two or more subcontractors used and would continue to use the scaffold in that state, it did not cease to be a common work area merely because, for a time, Leidal & Hart raised it above 25 feet. Plaintiffs have met all of the elements of the common work area doctrine.

Finally, Clark relies on Judge Wilder's dissenting criticism that the Court of Appeals majority decision encroaches on "imposing strict liability on general contractors for all hazards on construction sites." (Dissent, p 2 – Clark Appx 2). This hyperbolic contention is totally misplaced.

Contrary to Clark's claim that Defendants "took reasonable steps" to enforce safety on the site, (Clark application, p 32), this case involves egregious negligence – including by the Site Safety and Health Officer, Cory Hanson, who, instead of fulfilling his admitted duties to enforce standards requiring that the planks on the scaffold be supported with bridges/outriggers and secured with safeties and requiring fall-protection measures, hung out in his trailer most of the time looking for another job and running his marijuana business. The very notion that Defendants are innocent general contractors being subjected to "strict liability" is absurd.

This is also a case where Defendants, as co-general contractors, mutually and voluntarily agreed to be bound by the Army Corps of Engineers' Safety and Health Regulations manual, EM 385-1-1. EM 385 undisputedly mandated that the planks be supported and secured (not merely overlapped across the 8-10 foot gaps) and mandated that Defendants enforce fall-protection above six feet (not simply above 25 feet). Nothing in the Court of Appeals' majority decision precludes a general contractor from agreeing to lesser, or even more stringent, safety rules as governed this worksite. Accordingly, the unpublished majority decision does not impose "strict liability" – on Defendants or any other Michigan general contractors.

This appeal is not jurisprudentially significant under MCR 7.305(B)(3).[4] This is, instead, a standard, fact-intensive, MCR 2.116(C)(10) appeal.

Clark has failed to raise meritorious grounds for Supreme Court review. Plaintiffs-Appellees respectfully request that this Honorable Court deny Defendant-Appellant Clark Construction Company, Inc's application for leave to appeal.

[4] Clark's reliance on MCR 7.305(B)(2) is untenable. This is not a case "by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity." *Id*.

COUNTER-STATEMENT OF FACTS

Introduction

Clark's statement of facts violates MCR 7.305(A)(1)(d) and MCR 7.212(C)(6) by failing to present "[a]ll material facts, both favorable and unfavorable … without argument or bias." *Id* (emphasis added). Clark's statement of facts also borders on a vexatious pleading under MCR 7.316(C)(1)(b), as it has "violated court rules, (and) grossly disregarded the requirements of a fair presentation of the issues to the Court."

Although Clark applies for leave to appeal from the Court of Appeals' decision reversing entry of summary disposition under MCR 2.116(C)(10), which requires consideration of the material facts and all reasonable inferences in the light most favorable to Plaintiffs,[1] Clark presents only facts and inferences slanted in its favor. Clark does not merely omit extensive material, record evidence establishing Defendants' liability under the common work area doctrine, but scrubs away any facts supporting Plaintiffs' claim. To set the record straight, and to point out the inaccuracies and deficiencies in Clark's statement of facts, Plaintiffs present the voluminous, material evidence Clark has omitted.

Material Facts

Defendants were the co-general contractors for the Ft. Custer project.

On December 10, 2009, the United States Army Corps awarded BBCS the contract to serve as general contractor for construction of a training center and garage at the Fort Custer Training Center near Augusta, Michigan. (Waterman dep, 59:9-59:11 – Ex A; Hanson dep, 96:24-97:2 – Ex B). BBCS then entered into an agreement with Clark to serve as BBCS' "mentor" and co-general contractor. (Waterman dep, 9:6-9:23, 65:16-65:19 – Ex A; Schaibly dep, 8:23-9:5, 37:9-37:13 – Ex C; Hanson dep, 78:8-78:23 – Ex B). As Defendant's expert, Tom

[1] *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Destafney, concedes, BBCS and Clark were engaged in a "joint venture" as co-general contractors at the Fort Custer site. (Destafney dep, 27:1-27:12 – Ex D).[2]

Clark omits the concessions of its own representatives that the Army Corps of Engineers' Safety and Health Regulations manual, EM 385-1-1, governed construction and safety practices at the Ft. Custer site.

Clark incorrectly alleges that MIOSHA, and not "any particular manual," governed workplace safety, particularly safe operation of the Hydro Mobile platform, at the Fort Custer site. (Clark application, p 5). Trying to effectuate this false claim, Clark omits the concessions of its own representatives, project superintendent Jim Schaibly and project/quality manager Tammy Waterman, as well as its own expert, Tom Destafney, that the government's contract required BBCS and Clark to ensure that work at the site complied with EM 385-1-1 ("EM 385"), the US Army Corps of Engineers' Safety and Health Requirements Manual. (Waterman dep, 8:4-8:8, 14:5-14:18, 15:2-15:7, 106:5-107:10 – Ex A; Schaibly dep, 7:16-7:18, 12:10-12:24, 135:18-135:20 – Ex C; Destafney dep, 31:22-32:7 – Ex D; Wright dep, 174:5-174:18 – Ex E; EM 385 cover – Ex F). Clark further omits the concession of the project's Site Safety and Health Officer ("SSHO"), BBCS employee Cory Hanson, that BBCS was bound by EM 385, which he describes as the project's "bible of safety," and that he could not merely rely on the subcontractors' word about safety compliance, but had to independently observe their performance. (Hanson dep, 92:2-97:23 – Ex B).

EM 385 mandated that "[n]o person shall be required to work in surroundings or under conditions that are unsafe or dangerous to his or her health" and required that Defendants ensure "subcontractor compliance with the safety and occupational health requirements contained in this manual." (EM 385, p 1-1, 1-13, ¶¶ 01.A.01, 01.A.18 – Ex F). As demonstrated below, EM 385

[2] Clark's project and quality manager, Tammy Waterman, testifies that mentor contracts "brought us a lot of work and it was very profitable and we couldn't get work with the (Army) Corps on our own." (Waterman dep, 6:1-6:5, 8:4-8:13, 66:4-66:6 – Ex A).

governed safe operation of the Hydro Mobile platform from which Plaintiff fell.[3]

The Site Safety and Health Officer

EM 385 also required Defendants to employ "a minimum of one Competent Person" to be the "full-time" "Site Safety and Health Officer" ("SSHO"). (EM 385, pp 1-11, 1-12, ¶¶ 01.A.17, 01.A.17.a – Ex F; Waterman dep, 16:21-17:25 – Ex A; Destafney dep, 328:5-28:15, 3:5-33:13 – Ex D). The SSHO was "responsible for managing, implementing and enforcing the Contractor's Safety and Health Program …." (EM 385, p 1-12, ¶ 01.A.17.d – Ex F). EM 385 required that the SSHO, "as a minimum, must have completed the 30-hour OSHA Construction safety class" or equivalent training and have "five (5) years of construction industry safety experience or three (3) years if he possesses a Certified Safety Professional (CSP) or safety and health degree." (Id, p 1-12, ¶01.A.17.b). Defendants' expert Destafney admits that a purpose of EM 385 and designation of the SSHO was to protect all workers on the site. (Destafney dep, 48:3-48:5, 59:18-60:3 – Ex D). BBCS hired Cory Hanson who, at all times pertinent, was the full time SSHO for the project. (Hanson dep, 46:12-46:16, 57:9-57:12, 72:14-72:16 – Ex B; Schaibly dep, 10:3-10:8 – Ex C; Waterman dep, 16:21-17:1, 33:23-33:25 – Ex A).

BBCS' designated SSHO, Cory Hanson, did not meet the requisite qualifications in EM 385.

Clark omits that Cory Hanson did not meet the minimal requirements of EM 385.[4] He did not have either five years of construction industry safety experience or three years of industry

[3] Clark cites only page 70 of Leidal & Hart foreman, Nicholas Martin's, deposition to support the allegation that MIOSHA, and "not the standards set in any particular manual," governed safe operation of planking on the Hydro Mobile platform. (Clark application, p 5). Clark omits that, when Martin asserted that MIOSHA exclusively regulated site safety, he was not even "aware" of the requirements in EM 385. (Martin dep, 63:1-63:6, 65:10-65:13, 70:12-70:20, 108:21-109:9– Ex G). As demonstrated below, this is because Defendants neither enforced nor even showed Martin EM 385.

[4] Plaintiffs address Mr. Hanson's lack of qualifications and Defendants' actual safety-oversight performance because Clark's application alleges that Defendants "did take reasonable steps" to monitor and enforce project safety. (Clark application, p 32).

safety experience and a certified safety professional degree. Mr. Hanson's education and employment were primarily in the field of business management and information technology ("IT"). (Hanson dep, 19:15-20:15, 21:5-23:20 – Ex B). Previously, he was never a safety officer and had only completed OSHA 10. (Id, 24:7-27:11, 31:13-31:22, 40:8-40:14, 47:8-47:11).

Before hiring Hanson, Steven Davis, a BBCS superior, gave Hanson power-point "slides" for the OSHA 30 course. (Hanson dep, 40:15-42:21 – Ex B). As indicated above, EM 385 required the SSHO to have completed OSHA 30. Hanson, however, concedes that he never actually took any test for completion of the OSHA 30 course, but merely reviewed the slides while staying at a Kalamazoo hotel. (Id, 45:22-45:24). Based solely on Hanson's representation that he reviewed the power point slides, Mr. Davis hired Hanson as the SSHO for the Fort Custer project. (Id, 46:6-46:16, 57:9-57:12).

Hanson was responsible for ensuring that all the subcontractors worked safely and complied with EM 385.

Continuing to incorrectly allege that MIOSHA exclusively governed site safety, Clark omits its managing representatives' concession that SSHO Hanson had the duty to ensure that all the subcontractors were working safely and complying with EM 385. (Waterman dep, 106:5-106:20 – Ex A; Schaibly dep, 13:20-14:11, 165:13-165:19 – Ex C). Waterman testifies that, if Mr. Hanson did not require subcontractors to comply with EM 385, he was not doing his job and would have been negligent. (Waterman dep, 107:15-108:6 – Ex A).

Numerous witnesses establish that Mr. Hanson was not only unqualified, but failed to properly perform his duties as the SSHO.

Unfortunately, soon after Mr. Hanson started work as the SSHO, Clark superintendent, Jim Schaibly, and Clark project/quality manager, Tammy Waterman, had concerns about Hanson's qualifications. (Schaibly dep, 30:14-30:23, 51:17-51:18 – Ex C; Waterman dep, 39:21-40:10 – Ex A). Defendants' own expert, Tom Destafney, concedes Hanson did not meet the Corps' required qualifications in EM 385, (Destafney dep, 33:17-34:6, 38:2-38:6, 44:15-

44:23, 95:25-96:8, 97:9-97:14 – Ex D), did not have the requisite experience to be the SSHO, (id, 33:17-34:6, 38:2-38:6), and did not pass the mandatory OSHA 30 test, (id, 44:15-44:23, 97:9-97:14). Mr. Destafney goes so far as to admit "I would not put him in that job." (Id, 98:8-98:17).

Even more, several people who worked on the project testify to Hanson's bad attitude, misplaced priorities, and poor job performance. Tammy Waterman testifies that, instead of doing his job, Mr. Hanson was often on the phone trying to find another job, talking about "get rich quick" schemes, or discussing his marijuana-growing business. (Waterman dep, 24:11-24:22, 40:16-41:20 – Ex A).[5] All of this occurred before Plaintiff's accident. (Id).

In addition, while Mr. Hanson claims he walked and inspected the job site four to five hours a day – encompassing 50% of his time, (Hanson dep, 66:16-67:7 – Ex B), numerous witnesses confirm that Hanson hardly ever left his trailer. Tammy Waterman states that Hanson "stayed in the trailer, he didn't go on site," (Waterman dep, 35:25-36:9, 44:25-45:1, 45:25-46:1 – Ex A), and left his trailer only once a week, (Id, 36:16-36:19). Jim Schaibly testifies that Hanson "really was in the trailer way too much of the time" and, as a result, did not catch safety problems. (Schaibly dep, 15:9-15:13, 16:5-16:8, 20:18-20:21 – Ex C). Electrician Eric Koshurin states Hanson was in the trailer "most of the day." (Koshurin dep, 25:8-26:16 – Ex H). Plumber Weston Allen testifies that Hanson spent most of the time "in his office trailer." (Allen dep, 13:15-13:24 – Ex I). As demonstrated below, Hanson's failure to inspect the site is particularly relevant because he did not inspect the Hydro Mobile scaffold from which Plaintiff fell. (Waterman dep, 41:21-42:14, 70:24-70:1 – Ex A; Schaibly dep, 51:9-51:14 – Ex C; Martin dep, 80:5-80:7 – Ex G).[6]

[5] Hanson was terminated from a recent job for marijuana abuse. (Hanson dep, 6:16-7:21 – Ex B).

[6] Clark safety supervisor, Don Volk, came to the site approximately once a month. (Waterman dep, 51:19-51:21 – Ex A).

Hanson also failed to perform other central duties of the SSHO job. A "lot" of the time, Hanson would not complete mandatory daily safety reports and failed to hold "any" safety meetings. (Waterman dep, 23:13-23:17, 40:11-42:22, 62:10-62:19 – Ex A). This is confirmed by plumber foreperson Allen, (Allen dep, 11:12-11:21 – Ex I); and by Nick Martin, the foreperson for Plaintiff's employer, Leidal & Hart, who does not recall having any contract with Mr. Hanson before the accident, (Martin dep, 6:6-7:22, 77:9-77:11 – Ex G).

Mr. Schaibly and Ms. Waterman add that Hanson would not even look at EM 385, did not understand it, and would not enforce its requirements. (Schaibly dep, 16:9-16:15, 30:24-31:17 – Ex C; Waterman dep, 58:10-58:22, 61:18-61:22 – Ex A). Hanson did not know how to link EM 385 to activity hazard analyses submitted by subcontractors. (Waterman dep, 58:10-58:13, 61:18-61:22 – Ex A).

Hanson and management ignored complaints about his poor performance.

Clark superintendent Schaibly talked to Hanson about getting out of the trailer and doing his job "several times." (Schaibly dep, 36:25-37:3 – Ex C). Hanson replied he did not need to and did not want to stop construction for a safety issue. (Id, 18:18-18:23, 37:12-37:14). Before Plaintiff's accident, Schaibly, Waterman, and the Army Corps itself complained to management about Hanson's performance and failure to get out of the trailer and inspect the site. (Schaibly dep, 27:7-28:18, 51:15-51:16, 96:22-97:2 – Ex C; Waterman dep, 38:23-38:25 – Ex A). Jim Schaibly describes Mr. Hanson's performance at the Ft. Custer site as so "poor," "bad," and "horrible" that he had to keep his "temper" in check. (Schaibly dep, 14:12-14:15, 15:19-15:20, 16:25-17:10 – Ex C).

Witnesses testify that, in addition to Hanson, Defendants poorly ran the Fort Custer project and that the site was unsafe.

Clark additionally omits, contrary to the contention that Defendants took "reasonable" job-safety steps, evidence that Cory Hanson was not the only supervisor who performed poorly

on this project. During work hours on site, Mike Shekaski, a Clark project manager, staged Texas hold 'em tournaments and devoted time to the car-rental and real estate businesses he was running on the side. (Waterman dep, 28:24-30:10 – Ex A; Schaibly dep, 35:16-36:15, 40:5-40:8 – Ex C). All of this prompted Jim Schaibly to conclude that this was a "bad" job, "one of the worst jobs that I have been a part of . . . it was bad." (Schaibly dep, 34:19-35:3 – Ex C). Plumber Allen testifies that the job was unsafe, and that safety regulations on other projects he has worked on have been "more stringent." (Allen dep, 42:18-42:24, 45:2-45:8 – Ex I).

Clark omits that Leidal & Hart, the wall construction subcontractor, was required to comply with EM 385.

BBCS awarded the subcontract for construction of the walls on the Ft. Custer site to Leidal & Hart. (Leidal dep, 5:23-6:1, 6:23-6:25, 26:25-27:2 – Ex J). In repeatedly alleging that nothing beyond MIOSHA governed work and safety at the site, Clark omits the concession of Leidal & Hart's principal, Brad Leidal, that the BBCS subcontract required Leidal & Hart to comply with EM 385. (Id, 29:11-29:25, 62:14-62:18). EM 385 directed Leidal & Hart, before beginning work, to submit an activity hazard analysis ("AHA"). (EM 385, p 1-9, ¶ 01.A.13 – Ex F). Even Leidal & Hart's safety director, Walter Kyewski, did not review or even receive EM 385. (Kyewski dep, 8:22-8:23, 59:19-59:22, 63:8-63:21 – Ex K). SSHO Hanson did not know how to link EM 385 to Leidal & Hart's (and other subcontactors') safety plans. (Waterman dep, 58:10-58:13, 61:18-61:22 – Ex A). As established below, had Defendants provided Leidal & Hart with, and enforced, EM 385, it would have mandated installation of safety features on the Hydro Mobile platform that would have prevented Mr. Dancer's fall.

Leidal & Hart used Hydro Mobile mast climbing platforms, or "scaffolds."

Leidal & Hart used several Hydro Mobile mast climbing work platforms at this site. (Martin dep, 11:6-11:12 – Ex G; Kyewski dep, 14:20-14:25 – Ex K). While the manufacturer refers to the machines as "mast climbing work platforms," (Hydro manual, p 4, first paragraph –

Ex L), they have been commonly referred to in this case as "scaffolds." An idealized depiction of the scaffold is shown on the cover of the Hydro Mobile owner's manual. (Hydro manual, p 1 – Ex L). To begin, each scaffold consists of a 24' x 7' base and two vertical masts. (Id, pp 1, 8). Workers climbed one of the masts to reach the work area. (Schaibly, 76:4-76:14 – Ex C; Koshurin dep, 10:17-10:21, 12:3-12:12, 63:10-63:12 – Ex K). The work area – a steel grid attached to the masts – was lifted by the scaffold's motor. (Hydro manual, pp 1 and 9, figure 1.4 – Ex L). Attached to the work area platform were "outriggers" – square steel tubes extending out toward the wall being constructed. (Id, pp 71-72; Martin dep, 66:19-67:6 – Ex G; Johnson dep, 31:3-31:12, 72:1-72:11, 99:10-99:22 – Ex M).

Planks that supported workers and materials were placed on top of the outriggers. (Hydro manual, p 71 – Ex L). "Outriggers can be installed on two levels . . . top and bottom." (Id). Leidal & Hart similarly used two platforms for the site's scaffolds. Masons and subcontractors used the lower platform. (Dancer dep 2, 47:4-48:2 – Ex N; Koshurin dep, 10:25-11:2 – Ex H; Photos – Ex O).[7] The upper platform, located just behind and about three feet taller than the upper, was used for placement of materials (or "staging"). (Id).

Clark omits that Leidal & Hart left gaps between the scaffold units where the wood planks were unsupported by outriggers.

Since the walls being constructed at Ft. Custer were wider than the span of one Hydro Mobile platform, Leidal & Hart lined up three in a row. (Photo, p 2 – Ex O). Clark omits that, because the width of the project was still larger than the span of the three scaffolds, Leidal & Hart's alignment of the three scaffolds left two gaps, eight to ten feet wide, between the outriggers of the left-central and central-right scaffolds. (Photo, p 2 – Ex O; Stewart dep, 39:7-40:5 – Ex P; Martin dep, 104:18-104:20 – Ex G; Johnson dep, 119:6-119:13 – Ex M).

[7] The photos in Exhibit 16 were taken on August 13, 2010 – four days after Plaintiff fell. (See Ex O, p 2, date-stamp). By this time, additional construction of the wall had been completed, but the photos accurately depict the two levels of the work platforms and the horizontal alignment of the three Hydro Mobile units at the time of the accident.

Clark omits that EM 385 and the Hydro Mobile manual required use of extension bridges and outriggers to support the wood planks in the "gap" areas between the units.

Clark's application avoids any reference to the fact that EM 385 required installation of bridges and outriggers to support the wood planks in the open gaps between the scaffold units. It is uncontested that this paragraph of EM 385 required erection and use of the mast climbing work platforms on site in compliance with the Hydro Mobile owner's manual. (Destafney dep, 45:25-46:3, 102:4-102:23 – Ex D; Kyewski dep, 54:7-54:15 – Ex K; EM 385, p 22-44, ¶ 22.N.01 – Ex F).

Tammy Waterman testifies that she gave the SSHO, Cory Hanson, a copy of the Hydro Mobile owner's manual. (Waterman dep, 59:12-59:20, 107:12-107:14 – Ex A). This manual warns, in a bold-type box on page two, that "**[a]ny use of one or several Hydro Mobile motorized units, with or without accessories, in such a configuration or manner as not explicitly described in this manual is not recommended without the prior written permission of Hydro Mobile Inc.**" (Hydro manual, p 2; original bold emphasis – Ex L). The manual includes a section listing, as accessories, Hydro Mobile's bridges and outriggers. (Hydro manual, pp 34-39, 71-74 – Ex L; Johnson dep, 93:14-93:20 – Ex M). These bridges were specifically designed to attach span extensions between Hydro Mobile units. (Wright, 37:22-39:12 – Ex E). Defense expert Destafney agrees that the proper bridges to be used to link the scaffolds were Hydro Mobile products. (Destafney dep, 77:12-77:18 – Ex D). Use of bridges and attached outriggers would have eliminated the eight to ten foot gaps between the units at the Ft. Custer site where the planks were not supported. (Id; Johnson dep, 94:1-94:3 – Ex M).

Leidal & Hart did not use any of the bridges/outriggers it owned, but instead merely overlapped planks over the 8-10 foot gaps between the units.

It is undisputed that Leidal & Hart owned several Hydro Mobile bridges of various sizes. (Leidal dep, 44:14-44:24 – Ex J; Kyewski dep, 47:13-47:23, 48:5-48:10 – Ex K; Martin dep,

54:24-54:25, 65:14-65:24 – Ex G). Despite this, and despite the requirements of EM 385 and the Hydro manual that bridge/outriggers be used to connect the spans between mast climbing work platforms, Leidal & Hart did not use any bridge/outrigger extensions on this project. (Wright dep, 45:20-45:24, 48:6-48:12 – Ex E). Leidal & Hart employee Glenn Johnson has no explanation for why they were not used. (Johnson dep, 5:5-5:8, 95:4-95:5 – Ex M).

Instead of attaching bridges and outriggers in the eight to ten-foot gaps between the Hydro Mobile units, Leidal & Hart merely laid overlapping 16-foot planks across the gaps. (Photo, p 2 – Ex O; Close-up photo of gap – Ex Q). There was nothing supporting the boards on the work surface under these eight to ten-foot gaps. (Koshurin dep, 15:25-16:6, 17:1-17:6 – Ex H). Clark omits defense expert Destafney concessions that:

1. The scaffold at the site was not equipped with bridge outriggers to support planking laid over the gaps. (Destafney dep, 106:7-107:13 – Ex D); and

2. Scaffolding with an insufficient work platform created a fall danger and risk (or high degree of risk) of injury to anyone higher than six feet. (Id, 105:5-106:6).

As established below, it is uncontested that Mr. Dancer fell while over one of the gaps which should have been supported by a bridge and outriggers.

Leidal & Hart also violated EM 385 and the Hydro Mobile manual by failing to secure the planks.

Leidal & Hart also did not use any device to secure the wood planks – including where they overlapped the gaps. As quoted above, EM 385 required erection and use of mast climbing platforms in compliance with the operations manual. The Hydro Mobile manual provided for "Universal Plank Safety Support" "installed at the extremes of planking to prevent planks from lifting, tipping and slipping." (Hydro Manual, p 74 – Ex L). EM 385 further required that "[p]lanking shall be secured to prevent loosening, tipping, or displacement and supported or braced to prevent excessive spring or deflection," and "shall be supported or braced to prevent

excessive spring or deflection and secured and supported to prevent loosening, tipping or displacement." (EM 385, pp 22-6, 22-7, ¶¶ 22.BV.08.(2).c, 22.B.08.(2).h – Ex F).

Clark asserts, as gospel, that MIOSHA solely applied, that overlapping 16-foot planks is the industry standard, and that use of securing devices would have created a trip hazard. (Clark application, p 5). In raising this argument, Clark totally avoids the failure to support the planks under the gaps with bridges and outriggers. Clark also omits the testimony of electrician Eric Koshurin, who nearly fell off the scaffold two weeks before Mr. Dancer's accident when an unsupported and unsecured plank over a gap between the units rose up, (see below), that overlapping, particularly over the unsupported gaps, did not secure the planks. (Koshurin dep, 24:13-24:18 – Ex H). Clark further omits BBCS safety director Walter Kyewski concession that Leidal & Hart was required to secure the planks on this project with safeties – whether or not they were overlapped or supported in the gaps by bridges and outriggers. (Kyewski dep, 53:11-53:23 – Ex K). Kyewski admits that (a) his company owned safeties that would have secured the planks, and (b) installation of devices to secure the planks would not have been difficult or slowed production. (Id, 54:24-55:22).[8] Notwithstanding, it is uncontested that, up to Mr. Dancer's fall, no safeties or other devices were used to secure the planks on the scaffold. (Id, 53:24-53:25; Martin dep, 47:12-47:19 – Ex G; Koshurin dep, 17:20-17:22, 24:4-24:8 – Ex H).[9]

[8] Clark's omission of Kyewski's admissions that Leidal & Hart were required to use safeties to secure the wood planks – which were available and would not have been difficult to use or slowed production – is but one example of how their statement of facts violates MCR 7.305(A)(1)(d) and the standard of review under MCR 2.116(C)(10). If securing devices, in fact, created a trip hazard, why did Leidal & Hart concede they have to use them and why didn't witnesses other than Kyewski (including Defendants' experts) claim they were unsafe? While Clark is free to omit and spin evidence to a jury, it is patently inappropriate for a Supreme Court pleading – particularly in a MCR 2.116(C)(10) appeal.

[9] Nick Martin, who never even saw EM 385, claims that the planks did not have to be secured unless there were "extreme wind conditions." (Martin dep, 47:20-47:21 – Ex G). Nothing in EM 385 (which Defendants never gave Martin) or the Hydro Mobile manual supports this contention.

Cory Hanson never notified Leidal & Hart of the applicable requirements of EM 385 and the Hydro Mobile manual. By Hanson's own admission, this failure establishes that he was "negligent."

Clark project and quality manager, Tammy Waterman, testifies that it was Cory Hanson's and BBCS' job to enforce EM 385 and the Hydro Mobile manual and require Leidal & Hart to attach bridges and outriggers in the gaps between the units. (Waterman dep, 8:4-8:13, 106:21-107:14, 109:4-109:8 – Ex A). Ms. Waterman is clear that, if Hanson did not require compliance with EM 385 and the Hydro manual, he was not doing his job. (Id, 107:15-107:19). Clark superintendent Schaibly adds that Hanson was supposed to specifically enforce EM 385 for workers on the scaffolds. (Schaibly dep, 168:9-168:13 – Ex C). Cory Hanson himself admits that, if he observed that the scaffold planks were not secured and failed to enforce EM 385, he would have been "negligent." (Hanson dep, 129:7-129:21; emphasis added – Ex B).

Leidal & Hart's principal representatives testify they were not even aware of the requirements of EM 385. Brad Leidal was not familiar with EM 385. (Leidal dep, 62:19-63:6 – Ex J). Foreperson Nick Martin admitted he was unaware of EM 385 or its requirement that the erection and use of the scaffold comply with the Hydro Mobile manual. (Martin dep, 70:12-70:20, 127:14-127:16 – Ex G). Martin states that no one ever showed him EM 385, (id, 61:13-61:19), and that, "of course," he never even read it, (id, 62:2-62:3). Even Leidal & Hart's safety director, Walter Kyewski, who prepared the safety plan for this subcontractor, did not know about these regulations for the Ft. Custer project. (Kyewski dep, 49:11-49:19 – Ex K).

Foreperson Martin adds that he does not recall a representative of BBCS or Clark ever notifying him that Leidal & Hart had to comply with the Hydro Mobile manual. (Martin dep, 63:1-63:6, 65:10-65:13, 108:21-109:9 – Ex G).[10] As such, workers at the site continued to walk on the scaffold's unsecured planks with no bridges/outriggers over the eight to ten-foot gaps.

[10] Since Martin did not know Leidal & Hart was required to comply with EM 385 and install bridges/outriggers across the gaps between the Hydro Mobile units and secure the (continued)

Clark omits that Defendants did not enforce fall protection requirements.

Clark also omits unrebutted evidence that Defendants did not enforce fall protection requirements on the site. EM 385 mandated adherence to a "**fall protection threshold height requirement is 6 ft. (1.8 m) for ALL WORK covered by this manual** …." (EM 385, p 21-1 ¶ 21.A; original emphasis – Ex F). Leidal & Hart representatives agree that regulations required 100% fall protection above six feet. (Martin dep, 23:5-23:8 – Ex G; Leidal dep, 67:19-67:24 – Ex J; Johnson dep, 54:13 – Ex M). The sole exception was when workers were up on the scaffold's platforms, enclosed by the wall and guard rails. (Stewart dep, 43:8-43:11 – Ex P; Martin dep, 112:4-112:10 – Ex G; Kyewski dep, 74:7-75:21 – Ex K; Johnson dep, 40:23-41:5 – Ex M). Defendants' expert, Tom Destafney, acknowledges that any fall from six feet or higher can cause significant injury. (Destafney dep, 88:15-88:24, 105:5-106:15 – Ex D). Notwithstanding, workers using the scaffold consistently failed to use fall protection. (Schaibly dep, 77:6-77:10 – Ex C; Koshurin dep, 10:17-10:24, 11:3-11:5, 12:18-12:24, 13:16-13:20 14:13-14:17 – Ex H; Allen dep, 38:13-38:23 – Ex I; Johnson dep, 99:2-99:9 – Ex M).

Clark omits the concessions of superintendent Schaibly and defense expert Destafney that Leidal & Hart's failure to use bridges/outriggers to support the planks, failure to secure the planks, and failure to enforce fall-protection requirements were visible/known dangers.

In its next material omission, Clark ignores the concessions of its superintendent Schaibly and expert Destafney that the absence of the extended bridges and outriggers in the 8-10-foot gaps with the unsecured planks and failure to enforce fall-protection on the scaffold were visible/known hazards. Schaibly admits that he knew the planks on the scaffolding were overlapped across the gaps without being secured. (Schaibly dep, 77:14-77:18 – Ex C). Both Schaibly and Destafney admit that the absence of extended outriggers across the entire span of the scaffold units created a visible hazard that Cory Hanson would have seen had he left his

---

planks, Clark improvidently relies on Martin's testimony that MIOSHA exclusively governed safety on the project.

trailer and inspected the scaffold unit. (Schaibly dep, 163:22-164:20 – Ex C; Destafney dep, 49:24-50:3, 106:7-106:10, 107:6-107:13, 109:21-110:2 – Ex D). Superintendent Schaibly also concedes that both he and SSHO Hanson knew fall protection was not used. (Schaibly dep, 77:6-77:13 – Ex C).

At least 15 employees of several subcontractors used the scaffold and were exposed to the same hazard of the unsecured planks overlapping the gaps.

A total of 50 to 100 individuals worked at the Ft. Custer site. (Schaibly dep, 153:22-154:7 – Ex C; Waterman dep, 102:3-102:8 – Ex A). It is unrebutted that employees of several subcontractors worked on the scaffold. Plumber Weston Allen states that "everyone in (the general contractor's) trailer knew that all trades were using scaffolding." (Allen dep, 5:2-7:3, 36:19-36:22 – Ex I). BBCS safety director, Walter Kyewski, admits that, from the size of the platforms, subcontractors could put "as many (workers) as you want to put" up there. (Kyewski dep, 46:2-46:9 – Ex K).

Leidal & Hart masons (bricklayers) and mason tenders (laborers) worked on the scaffold. Most days, between eight and eleven Leidal and Hart employees were on the scaffold. (Martin dep, 74:8-74:20 – Ex G; Kyewski dep, 46:5-46:10 – Ex K; Johnson dep, 13:16-14:11, 17:21-18:1 – Ex M; Dancer dep 1, 18:23-19:2 – Ex R).

Employees of the electrical subcontractor, Henry Electric ("Henry"), "regularly" worked on the scaffold. (Hanson dep, 152:19-152:24, 178:5-178:20 – Ex B; Schaibly dep, 74:4-74:23 – Ex D; Koshurin dep, 7:7-7:8, 9:11-10:7 – Ex H). Both BBCS and Clark were aware of this. (Id). Moreover, electrician Eric Koshurin testifies that SSHO Hanson specifically authorized the electrician's use of the scaffold. (Koshurin dep, 44:16-44:19, 45:3-45:6 – Ex H).[11]

Mr. Koshurin further testifies that two Henry employees, himself and the foreman, were up on the scaffold. (Koshurin dep, 9:11-10:7 – Ex H). For "a week or two" before Plaintiff was

[11] Evidence, which Clark omits, rebutting its position that Leidal & Hart "complete(ly) controlled" use of the scaffold. (Clark application, p 21).

injured, an employee from another electrical subcontractor, "Mark Shepherd's company," also worked with Koshurin and the foreman on the scaffold. (Id, 10:1-10:7, 38:1-38:24). Koshurin adds that, when the electricians were on the scaffold, the masons were up there with them "all day." (Id, 10:8-10:16). The electricians worked on the scaffold with the masons "a good three to four months." (Id, 13:4-13:11). Indeed, Mr. Koshurin explains that the electricians "chased" the masons. (Id, 62:9-62:23, 90:13-90:19). As the masons constructed the walls, the electricians installed conduits (or "pipes"), insulators, and boxes. (Id, 11:6-11:14, 24:23-25:3, 39:6-29:19, 58:4-58:7, 62:9-62:23, 90:13-90:19, 91:6-91:12).

Clark omits Eric Koshurin testimony that he and the other electricians would work on the scaffold when it was raised as high as 20 to 25 feet, (Koshurin dep, 11:21-11:23, 43:8-43:14 – Ex H), as well as Leidal & Hart employee Glen Johnson's recollection that the electricians might have climbed up the scaffold as configured at the "time" of Mr. Dancer's fall, (Johnson dep, 44:20-44:24 – Clark Appendix 10).[12] Clark additionally omits Koshurin statement that he is "more than positive" that, for about two weeks, he worked on the scaffold at the same wall where Plaintiff fell. (Koshurin dep, 41:20-41:25, 43:5-43:7, 88:2-88:5, 91:6-91:12 – Ex H). Koshurin testifies that he worked on the scaffold at that wall until a half a week or week before Plaintiff's accident. (Id, 44:4-44:11, 54:17-54:19). Plumber Weston Allen confirms seeing electricians "frequently" up on the scaffold with the masons, in July and August 2010, putting conduits in the constructed walls. (Allen dep, 7:16-9:13 – Ex I).

In addition to the masons, mason tenders and two electrical subcontractors, employees of the plumbing subcontractor, Szydlowski Plumbing, also worked up on the Hydro Mobile scaffold assembly. Weston Allen, the foreperson of the plumbing crew, testifies that his crew used the scaffold about 12 to 16 times to install pipes in the walls the masons were constructing.

[12] Clark falsely alleges that "[a]ll of the testifying witnesses agreed" only Leidal & Hart employees used the scaffold above 20 feet. (Clark application, p 8).

(Allen dep, 5:2-7:3 – Ex I). Mr. Koshurin corroborates that "plumbers" worked on the scaffold. (Koshurin dep, 14:25-15:2 – Ex H). The plumbers worked on scaffolds up to 14-16 feet high. (Allen dep, 6:18-6:21, 37:4-37:7 – Ex I). Plumbers would walk on both the upper and lower platforms. (Id, 54:5-55:1).

Even more trades worked up on the scaffolding, including pipefitters (or "ironworkers"), (Johnson dep, 112:16-112:25, 113:7-113:9, 122:11-122:15 – Ex M; Schaibly dep, 74:20-75:3 – Ex D), caulkers, (Koshurin dep, 24:19-24:22, 46:23-47:1 – Ex H), as well as representatives of Clark, (Johnson dep, 112:5-112:11, 119:14-119:21 – Ex M), and the Corps, (Koshurin dep, 15:3-15:8, 52:20-53:1 – Ex H).

By the date of Plaintiff's fall, August 9, 2010, construction had not yet begun on two of the training center's four walls. (Photo[13] – Ex S; Martin dep, 10:15-10:23 – Ex G). The uncompleted walls were the same or "very close" to the same height as the walls that were nearly finished. (Martin, 10:15-10:23 – Ex G). While the Hydro Mobile scaffolds would be used to construct the remaining two walls, Leidal & Hart did not change any of the procedures already in use. (Id, 52:6-52:12). Leidal & Hart continued to use the scaffolds without installing bridges over the gaps and without securing the planks.[14]

In addition to Leidal & Hart's employees, who had to use the scaffolding to construct the remaining walls, the electrical subcontractor, Henry Electric, continued to work on the project and install conduits in the walls through August 2010. (Koshurin dep, 25:17-25:18, 39:6-39:9 – Ex H; Allen dep, 7:16-8:15, 9:7-9:13 – Ex I). Weston Allen testifies that the plumbing subcontractor still had to install "pipes through the wall at a later date . . ." (Allen dep, 54:3-54:4

[13] The photo in Exhibit 20, showing near completion of only two of the training center's four walls was taken about four days after Plaintiff's accident, on approximately August 13, 2010. It establishes that, at the time of the accident, two of the walls still had to be built.

[14] A memo from Brad Leidal to Cory Hanson, dated 8/12/10, claiming that it was unnecessary to secure the planks absent "wind uplift," confirms that Leidal & Hart continued to use the scaffold in the same manner as before Plaintiff's fall. (8/12/10 memo – Ex T).

– Ex I). Heating and cooling contractors (or "tin knockers") were also scheduled on the site after Plaintiff's accident. (Allen dep, 53:11-54:4 – Ex I; Schaibly dep, 75:7-75:24 – Ex C).

By even the most conservative calculation, this establishes that, both before and after Plaintiff's accident, at least 15 employees of several subcontractors (Leidal & Hart, Henry Electric, Shepherd Electric, Szydlowski Plumbing, and the heating and cooling contractor), used the Hydro Mobile scaffolding on this construction site.

> **Clark omits that, approximately two weeks before Mr. Dancer's fall, electrician Koshurin twice complained to Cory Hanson about nearly falling due to the unstable, unsecured scaffold planks over the gaps. Notwithstanding, Hanson did nothing to inspect or address a hazard superintendent Clark admits was visible.**

Clark's statement of facts glaringly omits that, about two weeks before Mr. Dancer fell, electrician Eric Koshurin's nearly fell due to unsecured planks over one of the scaffold's gaps and repeatedly complained to SSHO Hanson. While working up on the scaffold in late July or early August 2010, before Mr. Dancer's accident, was walking on the wood plank platform over one of the gaps. (Koshurin dep, 17:20-18:11, 53:16-53:19 – Ex H). Suddenly, one of the planks rose up and Koshurin nearly fell to the ground. (Id). He explains:

> I stepped on the edge of a board and another individual was on the other end and he ended up raising up and we both kind of danced back and forth until we landed on something solid. (Id, 18:2-18:6).

Being over a gap, the planking was the only thing between Koshurin and the ground. (Id, 18:7-18:11). The planking was not supported by outriggers and was not secured. (Id, 17:20-17:22). Koshurin is clear that this condition existed before Plaintiff fell. (Id, 24:4-24:12).

Affected by this "frightening" experience, (Koshurin dep, 21:8-21:17 – Ex H), Mr. Koshurin promptly notified the SSHO, Cory Hanson, about the incident, (Id, 18:14-18:24 – Ex 8). He told Hanson about "the planking not being solid." (Id, 19:11). Hanson promised Koshurin he'd address the problem. (Id, 19:17-19:19). Mr. Hanson, however, did nothing. Leidal & Hart foreperson, Nick Martin, testifies that Hanson never raised any safety issue.

(Martin dep, 114:21-114:24 – Ex G). In fact, Martin states that no BBCS or Clark representative ever discussed safety after the orientation meeting at the beginning of the project. (Id, 60:6-60:11).

Seeing that the planks remained unsecured, before Plaintiff's accident, Mr. Koshurin went back to Cory Hanson. (Koshurin dep, 19:25-21:2 – Ex H). He again complained that the "boards needed something on the end to lock them . . ." (Id, 19:25-20:12). Hanson said he would talk to foreperson Martin about it. (Id, 19:25-20:12, 23:3-23:8). Once again, Hanson did nothing. Up to the time Plaintiff fell, the planks on the scaffold assembly were never secured. (Id, 23:11-23:15). Outriggers supporting the planks over the gaps were never installed.

As demonstrated above, before Plaintiff's accident, the SSHO, Mr. Hanson, not only infrequently left his trailer, but consistently failed to inspect the scaffolding. (Waterman dep, 70:24-71:1 – Ex A). Leidal & Hart foreperson, Nick Martin, concurs. He does not recall Hanson ever inspecting the scaffold. (Martin dep, 80:5-80:7 – Ex G). Tammy Waterman testifies that, even when Leidal & Hart were first erecting the combined scaffold units, Hanson just "stayed at his desk" in the trailer" and "looked out the window" with "a pair of binoculars." (Waterman dep, 35:25-36:15 – Ex A). Clark further omits that, even though he was required to, Hanson did not go out on the site and double-check the inspection tags on the scaffold that were supposed to be completed and initialed every day. (Waterman dep, 41:21-42:14 – Ex A; Schaibly dep, 24:15-25:23 – Ex C; Martin dep, 51:10-51:20 – Ex G).[15]

Leidal & Hart hired Plaintiff as a mason tender.

Ronnie Dancer had been a mason tender for about 20 years. (Dancer dep 1, 13:1-13:6 –

[15] Mr. Hanson claims he inspected the scaffold and checked the tags every day. (Hanson dep, 93:24-95:15 – Ex B). Hanson concedes that he could not rely on the subcontractors' word that the site was safe, but had to go out and independently observe work and equipment. (Id, 97:16-97:23). Clark's reliance on the alleged expertise of Leidal & Hart employees Nick Martin and Mike Wiejach completely ignores evidence that Hanson did not fulfill his duty to inspect the scaffold and check the tags every day.

Ex R; Dancer dep 2, 62:17-62:18 – Ex N). His job was to haul and give materials to the masons (bricklayers). (Dancer dep 1, 13:7-13:8 – Ex R).

Leidal & Hart hired Mr. Dancer on July 16, 2010. (Dancer dep 1, 28:12-29:4 – Ex R; Martin dep, 25:18-25:21 – Ex G). Mr. Dancer testifies that "I was a grunt" on the project. (Dancer dep 2, 29:20-29:24 – Ex N). He gave made mud, hauled brick, block and mud to the bricklayers, and picked up trash. (Id). Foreperson Nick Martin describes Ronnie as "the best" mason tender they had. (Martin dep, 53:8-53:16 – Ex G).

On August 9, 2010, Ronnie Dancer fell off the scaffold when an unsecured and unsupported plank laid over one of the gaps flipped up – the same thing that nearly happened two weeks early to Eric Koshurin.

On the morning of August 9, 2010, a full Leidal & Hart crew worked on the scaffold. (Johnson dep, 56:22-56:25 – Ex M). A memo confirms that "[a]pproximately 10 masons had been working on the scaffolding early in the morning . . ." (8/10/10 memo – Ex T).

Leidal & Hart foreperson Martin testifies that it started raining and, at about 9:30 am, he sent the bricklayers home. (Martin dep, 26:12-26:20 – Ex G). Five members of the crew remained. (Id, 27:8-27:24). Mr. Martin asserts that he asked Plaintiff to remain and raise/set up the scaffold for the next day. (Id, 29:23-30:1, 56:9-56:11). Mr. Dancer, while not remembering what happened before he fell, testifies that his job did not involve raising the scaffold. (Dancer dep 1, 20:10-20:23 – Ex R; Dancer dep 2, 29:14-29:16 – Ex N).[16] At that time, the scaffold had been raised to an elevation between 35 and 40 feet. (Schaibly dep, 31:18-31:24 – Ex C). Eric Koshurin testifies that there were "other laborers" on the scaffold at the time of the accident.

[16] If Plaintiff raised the scaffold, it is uncontested that no one supervised him. (Martin dep, 30:14-30:16 – Ex G). Nick Martin went back to his trailer while Plaintiff worked on the scaffold. (Id, 30:17-30:20). Jim Schaibly testifies that a "competent person," who was specifically trained on Hydro Mobile equipment, should have supervised Plaintiff while he was on the scaffold on August 9, 2010. (Schaibly dep, 83:6-83:15 – Ex C; see also Kyewski dep, 48:10-48:16 – Ex K). Plaintiff had received a scaffold certification, but he was trained on six-foot jacks and a homemade scaffold, not Hydro Mobile equipment. (Dancer dep 2, 20:11-21:8 – Ex N).

(Koshurin dep, 73:2-73:8 – Ex H).[17] Glenn Johnson says Plaintiff was the only person on the scaffold. (Johnson dep, 24:17-24:19 – Ex M).

Glenn Johnson, who was working on a crane, observed the incident. (Johnson dep, 11:2-11:7 – Ex M). Clark cites and quotes only selected excerpts of Mr. Johnson's deposition testimony. Clark cites the portion of Johnson's testimony stating that, before he fell, Mr. Dancer moved planks and raised the scaffold, but omits Johnson's conflicting concessions that he merely "assume(s)" Mr. Dancer moved the planks for some purpose and does not know if Dancer raised the scaffold before he fell. (Johnson dep, pp 23:7-23:9, 79:8-79:12 – Ex M).[18] Clark further omits Johnson's testimony that, at the time of the accident, Mr. Dancer was not "moving" the planks, but was walking back and forth on the platform and stacking material to be down-loaded by Johnson's crane. (Id, 11:13-11:18, 12:5-12:18). Clark quotes Johnson's opinions that Mr. Dancer created a fall hazard, while omitting Johnson's testimony that, at the time Plaintiff fell, the planks were positioned so there was no visible opening in the platform's planking. (Id, 80:6-80:17, 90:7-90:18).[19] Clark also omits Johnson's testimony that use of bridges and outriggers

[17] Clark acknowledges Koshurin's testimony that there were other workers on the scaffold with Dancer at the time he fell, but challenges his credibility. (Clark application, p 14). The standard of review prohibits rejecting admissible evidence based on credibility issues. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[18] Clark erroneously cites the depositions of Johnson, Kyewski, and Stewart (the MIOSHA investigator) for the proposition that Dancer must have moved the planks because he "encountered a clamp and a board used to establish the angle of the wall …." (Clark application, p 9). Johnson does not say anything about Mr. Dancer encountering a "clamp" or a "board." (Johnson dep, 10:6-10:18 – Clark Appendix 10). Kyewski and Stewart were not even at the site on the day of the accident. (Kyewski dep, 9:8-9:23 – Clark Appendix 9; Stewart dep, 4:4-4:18, 13:14-13:19 – Clark Appendix 13). Their opinions about Dancer's actions and the configuration of the scaffold are hearsay and do not constitute admissible evidence supporting summary disposition under MCR 2.116(G)(6).

[19] Johnson's testimony that there was no visible gap in the planking, which Clark ignores, rebuts its allegation that Mr. Dancer "created" the gap through which he fell. (Clark application, p 14). All of the other witnesses Clark relies on for the proposition that Dancer created a fall hazard did not witness the incident or see the pre-accident configuration of the planks. Clark omits MIOSHA investigator Stewart's concession that he does not know if Plaintiff (continued)

over the gap where Plaintiff fell would have possibly prevented his fall. (Id, 117:8-117:11).

As Glenn Johnson observed, in the process of stacking material on the scaffold, Mr. Dancer walked on planks directly over one of the 8-10 foot gaps (an "area between the towers"). (Johnson dep, 11:2-11:7, 25:22-26:7, 90:13-90:18, 109:16-110:10 – Ex M). An unsecured plank "teeter(ed)" and "flipped up." (Id). Unfortunately, because Ronnie was over one of the gaps, no outriggers supported the plank when it rose up. (Id). Mr. Dancer started falling to the ground. (Id,). Johnson observed that, as Mr. Dancer started to come down, he grabbed onto the wall and held on for about ten seconds, then slipped and fell down to the ground. (Id, 27:13-27:17).[20] This is the same thing that nearly happened to Eric Koshurin a couple weeks earlier.

Some of the unsecured planks fell to the ground near Mr. Dancer. (Id, 28:7-28:10, 77:13-77:18; Schaibly dep, 63:13-64:17 – Ex C).[21] Photos show the location in the gap where Mr. Dancer fell and missing unsecured planks on the platform area. (Photos – Ex V).

After calling 911, Jim Schaibly, Tammy Waterman, and several other workers rushed to Ronnie's side. (Schaibly dep, 57:9-57:17, 58:15-59:21 – Ex C; Waterman dep, 44:15-47:8 – Ex

---

improperly overlapped the planks. (Stewart dep, 28:5-28:9 – Clark Appx 13). Clark also falsely alleges that expert Michael Wright's theory concurs that Dancer "created the hazard" that caused his fall. (Clark application, p 13). Clark avoids Wright's actual testimony that Dancer was innocent and not at fault, (Wright dep, 196:19-196:25 – Clark Appx 19), and that it was Defendants who were repeatedly negligent and a cause of this accident, (id, 45:25-46:3, 119:21-129:8, 149:12-149:17, 153:1-153:21, 155:15-155:25, 157:6-158:16, 167:20-170:2, 194:6-195:2).

[20] Mr. Dancer was not wearing a fall protection device when he fell. (Martin dep, 39:18-39:20 – Ex G). As indicated above, fall protection was not required while workers were walking on the scaffold platforms enclosed by the guardrails. (Stewart dep, 43:8-43:11 – Ex P; Martin dep, 112:4-112:10 – Ex G; Kyewski dep, 74:7-75:21 – Ex K; Johnson dep, 40:23-41:5 – Ex M). This is what Glenn Johnson says Plaintiff was doing when the plank flipped and he fell. In addition, Clark omits testimony that there was no discernable point on scaffold where Mr. Dancer could have attached a lanyard. (Johnson dep, 125:2-125:6 – Clark Appx 10; Wright dep, 103:14-105:2, 161:3-161:21 – Clark Appx 19; Wojcik dep, 41:3-41:18 – Ex U). Even more, as demonstrated above, Defendants had not enforced the fall protection requirements.

[21] Again establishing that the witnesses Clark relies on, who came to the scene only after Mr. Dancer fell and after the planks tumbled to the ground, did not know their pre-accident configuration.

A; Koshurin dep, 28:4-28:12 – Ex H). They found Mr. Dancer "crumpled in a pile," "moaning and groaning in pain." (Waterman dep, 45:9-47:8 – Ex A; Schaibly dep, 58:15-59:21 – Ex C). He did not say anything. (Waterman dep, 45:22-46:8 – Ex A; Schaibly dep, 58:15-59:21 – Ex C; Koshurin dep, 28:4-28:12 – Ex H).[22]

For his part, after being notified of Plaintiff's fall, SSHO Cory Hanson remained in his trailer. (Waterman dep, 44:25-45:1 – Ex A). Hanson did not leave the trailer until after the ambulance left. (Id, 49:2-49:5).

Ronnie Dancer suffered permanent, catastrophic injuries in this fall. As indicated above, Glenn Johnson testifies that use of bridges and outriggers over the gap where Plaintiff fell would have possibly prevented his fall. (Johnson dep, 117:8-117:11 – Ex M). Clark superintendent Schaibly goes even farther. He admits that, if Cory Hanson had done his job, Plaintiff's accident may have been prevented and that Hanson's failure to enforce safety was "a cause" of Plaintiff's injury. (Schaibly dep, 143:9-143:25, 168:9-168:20 – Ex C). Schaibly also concedes that Clark shares responsibility for this accident. (Id, 143:9-143:25).[23]

---

[22] Testimony that Ronnie Dancer did not speak after the fall, including that of Eric Koshurin, who was on-site and had to reach Ronnie before Mr. Martin (who was back in his trailer), rebuts the unseemly claim of Martin (which Defendants relied on below) that, immediately after he fell, Plaintiff said the accident was his fault and that he was "sorry." Furthermore, Mr. Dancer, who suffered a severe head injury, does not recall the accident. (Dancer dep 1, 16:10-16:12 – Ex R). This counters the self-serving contention of Leidal & Hart principal Brad Leidal (which Clark now relies on) that, at the hospital, Plaintiff said he had moved some planks, the accident was his fault and that he was "sorry."

[23] Characteristically, Clark omits any reference to its own superintendent's admission that both BBCS and Clark were at least partially responsible for Ronnie Dancer's injuries. Instead, Clark deceptively emphasizes that MIOSHA cited Leidal & Hart, who was never identified as a potential nonparty at fault in this case. Clark omits investigator Stewart's concessions that he did not even consider the acts, omissions or potential violations of the Defendant general contractors, or Defendants' obligations under EM 385 (which Stewart acknowledged may have imposed "more stringent" worksite safety standards than MIOSHA), but only the potential MIOSHA violations of the employer Leidal & Hart. (Stewart dep, 11:22-11:25, 38:5-38:15, 41:2-41:12, 44:1-44:20, 46:6-46:10 – Clark Appx 13).

Material Proceedings

On January 12, 2012, Plaintiffs filed a complaint against Defendant Clark in the Wayne Circuit. (Wayne Circuit register of actions, case no. 12-001171-NO). On September 27, 2012, the Wayne Circuit transferred venue to the Kalamazoo Circuit. (Kalamazoo Circuit No. 2012-0571-NO). Plaintiffs filed a second amended complaint adding Defendant BBCS on December 12, 2012. (Second amended complaint; Register of actions, 12/12/12 entry). Plaintiffs alleged that Defendants negligently performed their duties as the project's general contractors and are liable under the common work area doctrine. (Id, counts I and II, ¶¶ 30B, 30C, 44B, 44C). No party filed a notice identifying Leidal & Hart as a nonparty at fault. (See Register of actions).

On May 7, 2014, BBCS moved for summary disposition, arguing that the elements of the common work area rule are not met. (BBCS MSD brief, pp 8-20; Register of actions, 5/7/14 entries). Clark moved for summary disposition on May 12, 2014. (Clark MSD; Register of Actions, 5/12/14 entry). Like BBCS, Clark argued that the elements of the common work area doctrine are not met in this case, claiming that (1) there was no readily observable danger, (Id, brief in support, pp 4-5), (2) there was no risk to a significant number of workers, (Id, pp 5-11), (3) no hazard existed until Plaintiff allegedly "improperly placed planks" while working on the scaffold on August 9, 2010, (Id, p 3), and (4) the scaffold was not a common work area, (Id, pp 11-19). Defendants did not dispute that they exercised supervisory and coordinating authority over safety at the Ft. Custer site. (BBCS MSD; Clark MSD; 9/3/14 opinion & order, p 3 – Clark Appx 3).

On July 11, 2014, Plaintiffs filed a statement of facts, brief in opposition to Defendants' motion for summary disposition, and supporting exhibits. (Plaintiffs' statement of facts, brief, exhibits; Register of actions, 7/11/14 entries). After demonstrating, in the statement of facts, that numerous employees of different subcontractors worked on the scaffold and were subjected to the identical hazards that caused Mr. Dancer's fall – particularly, that the planks were not

secured and placed over 8-10 foot gaps unsupported by bridges and outriggers, (Plaintiffs' statement of facts), Plaintiffs argued that ample evidence raises a genuine issue of material fact that all of the elements of the common work area doctrine are met. (Plaintiffs' 7/11/14 brief, pp 3-12). Plaintiff asserted that unrebutted evidence proves that Defendants had supervisory and coordinating safety authority over the project and failed to take reasonable steps to address the hazards created by the unsecured and unsupported planking – even after electrician Koshurin twice complained about the hazard to SSHO Hanson. (Plaintiffs' statement of facts, pp 4, 6-9, 10-11, 15; Plaintiffs' brief, p 10). Plaintiff argued that the absence of bridges/outriggers and devices to secure the planks, coupled with the subcontractors' wholesale failure to use fall protection, were readily observable and avoidable dangers. (Plaintiffs' brief, pp 6-10). Plaintiffs additionally demonstrated that these dangers created a high degree of risk to a significant number of workers – the masons, mason tenders, electricians, plumbers and other trades that used and walked on the unsecured planks laid over the gaps. (Id, pp 11-12). Plaintiffs added that Defendants' reliance on the fact that Mr. Dancer fell from above 35 feet is irrelevant, since other workers who worked up to 20-25 feet high on the scaffold faced the same risk of serious injury from falling. (Id, p 12). Finally, Plaintiffs argued that substantial evidence raises a material fact question that the scaffold constituted a common work area, because employees of at least two subcontractors used and would continue to use the scaffold and faced the same hazard that led to Mr. Dancer's fall. (Id, pp 3-6).

Defendants' motions for summary disposition came up for hearing before the Hon. Pamela L. Lightvoet on July 21, 2014. (Tr 7/21/14, p 4). After hearing arguments, the trial court took the motions under advisement and indicated it would issue a written opinion. (Id, p 42).

On September 3, 2014, the trial court issued a final opinion and order granting Defendants' motions for summary disposition. (9/3/14 order – Clark Appx 3). The court held that "Plaintiff has presented evidence that could create a genuine issue of material fact regarding

whether there was an existence of a readily observable, avoidable danger," but concluded that "Plaintiff has failed to satisfy the common work area doctrine." (Id, pp 3, 5). The court accepted Defendants' argument that Mr. Dancer "created the dangerous condition when he chose not to wear his fall protection device and when he improperly overlapped the planks." (Id, p 4). The court held that "there was not a high degree of risk to a significant number of workers and there was not an existence of a common work area." (Id, p 3).

After the trial court denied Plaintiffs' timely motion for reconsideration, (10/7/14 order), Plaintiffs filed a claim of appeal. On April 26, 2016, the Court of Appeals issued an unpublished, 2-1 decision reversing the summary disposition order.[24] The majority agreed with the trial court that "the bridging of the gaps between the scaffolding units with unsecured planks" was an "actionable" and "readily observable hazard." (COA majority opinion, p 9 n 6 – Clark Appx 1). The majority held that, since employees of other subcontractors used the scaffold at hazardous elevations of at least 14 feet, "the trial court erred in concluding that the scaffold was not a common work area when plaintiff fell solely because plaintiff fell from an elevation that only he and his fellow Leidal & Hart employees reached." (Id, p 4). Next, the majority rejected the trial court's conclusion that "evidence did not support the proposition that the allegedly hazardous condition placed a significant number of workers at risk":

> Whether or not Dancer was alone on the scaffold when he fell, "plaintiffs plausibly assert that the evidence supports the conclusion that at least 15 workers" (of different subcontractors), including electrician Koshurin who nearly fell due to the same dangerous condition, "were placed at risk by the hazard at issue" (the unsecured and unsupported planks). (Id, pp 6-7). Under Michigan law, this "established a question of material fact whether a significant number of workers occupied the allegedly unsafe scaffolding." (Id).

The majority then reversed the trial court's ruling that, as a matter of law, Mr. Dancer created the hazard that caused his fall and was the solely responsible for his injuries for failing to wear fall

[24] Contrary to MCR 7.305(A)(1)(d) and MCR 7.212(C)(6), Clark's statement of facts argumentatively spins and criticizes the majority decision. (Clark application, p 17).

protection and improperly overlapping the planks, because there is evidence that:

1. Plaintiff was not required to wear fall protection since, at the time he fell, he was walking on the scaffold while enclosed by guardrails, (id, p 7);

2. "[A] cavalier attitude about fall protection prevailed at the construction project …, (id, p 8);

3. Even accepting that Dancer moved the planks before he fell, "evidence of an earlier near occurrence of a similar fall belies the suggestion that plaintiff himself created a uniquely dangerous condition, and suggests that the work surface in question, with its reliance on unsecured planks to bridge gaps, where frequent adjustment of the planks was necessary as the surface was raised or lowered, was dangerously unstable by its nature," (id, p 9).

Ruling that this case raises material fact questions on the "questions of duty, breach, and comparative negligence for resolution at trial," the Court of Appeals reversed the summary disposition order. (Id, pp 9-10).

Judge Wilder dissented, stating, in pertinent part:

> "Here, the evidence, viewed in the light most favorable to plaintiff as the nonmoving party, establishes that plaintiff was not injured in the "same" area where employees of two or more subcontractors had worked; rather, he was injured in an area where the employees of only one subcontractor, Leidal & Hart, had worked. Moreover, there is no record evidence that employees of other subcontractors would "eventually" work on the scaffold at that same elevation." (Dissent, p 2 – Clark Appx 2).

Judge Wilder added that "[t]he majority's contrary conclusion is a step toward imposing strict liability on general contractors for all hazards on construction sites." (Id).

Clark had applied for leave to appeal to the Supreme Court. BBCS has also filed an application (S Ct No. 153889). Plaintiffs now respond to Clark's application. For the reasons presented, Clark's application for leave to appeal should be denied.

ISSUE PRESERVATION/STANDARD OF REVIEW

Plaintiffs presented and preserved their arguments in opposition to summary disposition under the common work area doctrine in Plaintiffs' July 11, 2014 statement of facts and brief in opposition, and in their Court of Appeals briefs. MCR 7.212(C)(7).

The trial court granted summary disposition under MCR 2.116(C)(10).[25] The standard of review requires the Court to consider affidavits and admissible record evidence, along with reasonable inferences, in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion under MCR 2.116(C)(10) only if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith, supra*, at 454-455. In deciding a motion for summary disposition, the court may not make findings of fact or weigh credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). This Court reviews de novo the trial court's ruling on the motions for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S ORDER GRANTING CLARK'S MOTION FOR SUMMARY DISPOSITION.

Although this appeal simply addresses whether evidence raises a material fact question satisfying the elements of the common work area rule, Clark avoids addressing the actual MCR 2.116(C)(10) issue until page 33 of its application. Apparently recognizing that this is a meritorious, fact-intensive, non-jurisprudentially significant case, Clark devotes the first 15 pages of its argument to meritless policy arguments, misconstruing the record about the nature of the risk, and a vexatious attempt to convince this Court that Defendants took "reasonable steps"

[25] While Clark's application inexplicably cites the standard of review for summary disposition motions under MCR 2.116(C)(8), (Clark application, pp 17-18), it does not raise any argument that Plaintiffs have failed to plead an actionable claim. In addition, Defendants moved for, and the trial court exclusively granted summary disposition under MCR 2.116(C)(10). (9/3/14 opinion & order, p 2 – Clark Appx 3). In the Court of Appeals, the parties solely addressed the propriety of summary disposition, based on the voluminous record beyond the pleadings, under MCR 2.116(C)(10). (COA opinion, pp 2-3 – Clark Appx 3). There is no summary disposition issue under MCR 2.116(C)(8).

to enforce safety at the site. Once Clark gets to the actual issue, it utterly fails to establish that the Court of Appeals erroneously reversed the trial court's order granting summary disposition. Clark has not raised grounds for Supreme Court review. Its application should be denied.

A. The Court of Appeals did not significantly expand general contractor liability, but correctly held that Plaintiffs have raised a genuine issue of material fact meeting each of the four elements of the common work area doctrine.

Trying to manufacture grounds for review under MCR 7.305(B)(3),[26] Clark spuriously contends that the Court of Appeals' holding "significantly expand(s) general contractor liability for construction site accidents …." (Clark application, p 18). The Court of Appeals did nothing more than properly construe the record – including the voluminous admissible evidence Clark omits – in the light most favorable to Plaintiffs, and correctly conclude that evidence raises a material fact question satisfying the long-recognized elements of the common work area doctrine. Contrary to Judge Wilder's statement, the Court of Appeals did not encroach on "imposing strict liability on general contractors for all hazards on construction sites." (Dissent, p 2 – Clark Appx 2).

1. The Court of Appeals' decision is consistent with the purpose of the common work area doctrine. Clark conceded below that Defendants exercised supervisory and coordinating control over safety of the entire project, including use of the scaffold.

Clark's lead argument, that the Court of Appeals subverted the purpose behind the common work area rule by holding Defendants potentially liable for subcontractor Leidal & Hart's negligence, is untenable. The common work area doctrine is a long-established exception to the general common-law rule that general contractors could not be held liable for the negligence of independent subcontractors and their employees. *Ghaffari v Turner Constr Co,* 473 Mich 16, 20; 699 NW2d 687 (2005). Since this Court's decision in *Funk v Gen Motors*

[26] Clark also claims grounds under MCR 7.305(B)(2), despite the fact this is not a case "by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity."

Corp, 392 Mich 91, 104; 220 NW2d 641 (1974), Michigan law "regard(s) it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." *Ghaffari, supra,* quoting *Funk, supra* (emphasis removed). "Essentially, the rationale behind [the common-work-area] doctrine is that the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees." *Latham v Barton Malow Co,* 480 Mich 105, 112; 746 NW2d 868 (2008). As this Court explains:

> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
>
> [A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors.... [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so.

Ghaffari, supra, 473 Mich at 20-21, quoting *Funk, supra,* 392 Mich at 104 (emphasis added).

The elements of a claim under the common work area doctrine are: "(1) the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area." *Latham, supra,* 480 Mich at 109. Clark asserts that this doctrine is "narrow," (Clark application, pp 18, 20), but fails to cite any authority so charactering the rule. This Court has repeatedly held that "[i]t is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments,

and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 557 NW2d 100 (1998) (citation and internal quotation marks omitted); *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 88–89; 869 NW2d 213 (2015). Moreover, as this Court has held, the common work area doctrine is not a narrow rule, but effectuates Michigan's strong public policy to encourage workplace safety and protect subcontractors who are in an inferior economic position to oppose unsafe equipment and practices.

Clark also argues that the common work area doctrine does not apply because Leidal & Hart exercised "complete control" over use of the scaffold. (Clark application, p 21). This is vexatious.

Clark conceded in the trial court that both Defendants exercised supervisory and coordinating authority over the entire project, which included use of the scaffold, satisfying the first element of the common work area rule. (Tr 7/21/14, p 27 – Clark Appx 22). Neither Defendant challenged this fact in the Court of Appeals. This Court will not consider an argument conceded below. *People v Szalma*, 487 Mich 708, 725; 790 NW2d 662 (2010).

In addition, evidence conclusively establishes that Leidal & Hart did not exercise "exclusive control" over the scaffold. Defendants' representatives and expert Destafney unequivocally admit that Clark and BBCS were responsible for overseeing safety at the entire site – including use of the scaffold. (Waterman dep, 8:4-8:13, 14:5-14:18, 15:2-15:7, 106:5-109:8 – Ex A; Schaibly dep, 7:16-7:18, 12:10-14:11, 135:18-135:20, 165:13-165:19, 168:9-168:13 – Ex C; Hanson dep, 92:2-97:23, 129:7-129:21 – Ex B; Destafney dep, 31:22-32:7, 67:11-67:12 – Ex D). Corroborating this, electrician Koshurin testifies that SSHO Hanson specifically authorized use of the scaffold. (Koshurin dep, 44:16-44:19, 45:3-45:6 – Ex H).

The Court of Appeals' decision was consistent with, and effectuated the purpose of the common work area doctrine.[27] Clark's lead argument is vexatious.

2. By Defendants' and Leidal & Hart's own concessions, EM 385 and the Hydro Mobile manual governed erection and safe use of the scaffold and required Defendants' oversight and, accordingly, are directly relevant to establishing that Defendants exercised supervisory and coordinating control under the common work area rule.

Clark's argument that EM 385 and the Hydro Mobile manual are "completely irrelevant" and that the Court of Appeals was "distracted" by their requirements, (Clark application, p 21), disregards the repeated concessions of Defendants' own representatives, defense expert Destafney, and Leidal & Hart managers. Clark superintendent Schaibly, Clark project manager Waterman, BBCS SSHO Hanson, and Destafney all admit that EM 385 governed safety at the site and required Defendants' oversight and enforcement – including erection and use of the scaffold. (Waterman dep, 8:4-8:8, 14:5-14:18, 15:2-15:7, 106:5-107:19, 109:4-109:8 – Ex A; Schaibly dep, 7:16-7:18, 12:10-12:24, 135:18-135:20, 168:9-168:13 – Ex C; Hanson dep, 92:2-97:23, 129:7-129:21 – Ex B; Destafney dep, 31:22-32:7 – Ex D). Leidal & Hart's principal, Brad Leidal, admits that the BBCS subcontract required Leidal & Hart to comply with EM 385. (Leidal dep, 29:11-29:25, 62:14-62:18 – Ex J). Leidal & Hart safety director Kyewski and defense expert Destafney concede that EM 385 required erection and use of the mast climbing work platforms on site in compliance with the Hydro Mobile owner's manual. (Kyewski dep, 54:7-54:15 – Ex K; Destafney dep, 45:25-46:3, 102:4-102:23 – Ex D). Clark's attempt to now

[27] Plumber Weston Allen's testimony alone establishes that application of the common work area rule to Defendants serves Michigan public policy. Allen testifies that, although the Ft. Custer job was unsafe, "[i]f you refuse to do a job, you tend to get fired." (Allen dep, 42:18-42:24, 45:2-45:8 – Ex I). So, like other subcontractor employees, Mr. Allen would not refuse to (continued) work in a dangerous situation, but tried to make the best of it. (Id). Protecting the safety of subcontractor employees, like Mr. Allen, who cannot protect themselves, is the central purpose of the common work area rule. *Ghaffari, supra.*

deliberately avoid the record and contest a fact Defendants themselves, their own expert, and Leidal & Hart conceded is vexatious.

Clark fails to cite any applicable authority supporting its contention that EM 385 and the Hydro Mobile manual are "completely irrelevant" to establishing the elements of the common work area doctrine. None of Clark's four cited unpublished cases contain even a shred of language rejecting the relevance of contracts or manuals in a common work area case.[28]

Next, Clark raises the bizarre argument that summary disposition should be granted because Mr. Dancer was not a third-party beneficiary of the Ft. Custer site contracts and because, under *Fultz v Union–Commerce Assoc*, 470 Mich 460, 469–470; 683 NW2d 587 (2004) and *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170; 809 NW2d 553 (2011), Defendants' owed Plaintiffs no tort duty "separate and distinct" from their contracts. Plaintiffs

[28] See *Leffler v HTNB Corp*, unpublished memorandum opinion of the Court of Appeals, issued March 18, 2008 (Docket No. 275962) (Clark Appx 24) (not a common work area case; the plaintiff raised only a third-party beneficiary claim; the common work area doctrine was not even mentioned); *Zarazua v Leitelt Iron Works, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006, (Docket No. 266022) (Clark Appx 25, pp 1-2) (not a common work area case, doctrine not mentioned; Court rejected plaintiff's third-party beneficiary claim); *Seafoss v Christmas Co*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004, (Docket No. 249925) (Clark Appx 26, p 4) ("In the instant claim, plaintiff did not assert that the common work area exception applied[,]" but relied only on the retained control rule); *Wallington v City of Mason, Christmas Co*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006, (Docket Nos. 267919, 269884) (Clark Appx 27, pp 2-5) (Court distinctly analyzed plaintiff's separate common work area and third-party beneficiary claims. The court reversed denial of summary disposition not based on any argument that contracts or manuals are irrelevant to a common work area claim, but solely because the plaintiff failed to raise a fact question that a significant number of workers were exposed to a high degree of risk.). In citing patently inapplicable unpublished cases, Clark omits that Michigan courts have consistently relied on the provisions of contracts and applicable manuals/standards to determine whether the elements of the common work area doctrine are met. See *Plummer v Bechtel Const Co*, 440 Mich 646, 651; 489 NW2d 66 (1992) (quoting safety enforcement contract language); *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2014 (Docket Nos. 312141, 313606), lv den after MOA, 497 Mich 993 (2015) (Ex W) (first element of common work area met because contract established that general contractor had "overarching responsibility" for site safety); *Rihani v Greeley & Hansen of Mich, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2005 (Docket Nos. 256921, 256941) (Ex X, pp 4-6) (holding first element of common work area met because contract was "replete with provisions making D'Agostini responsible for the safety of the project at the job site.").

do not raise a third-party beneficiary breach of contract action. (Second amended complaint – Clark Appx 4). Plaintiffs exclusively claim that Defendants were negligent and are liable under the common work area doctrine. (Id, counts I and II). As the above-cited cases establish, the common work area rule is distinct from and does not depend on proof of a third-party beneficiary relationship.

Moreover, since Plaintiffs claim arises under the common work area rule, Clark's contention that Defendants owed no tort duty "separate and distinct" from their contracts is totally unfounded.[29] As this Court has explained, *Fultz, supra*, does not bar a tort claim involving a contracting defendant if it negligently creates a hazard or owes a separate and distinct tort duty previously established by statute or common law "tort principles." *Loweke, supra*, 489 Mich at 560-561. Here, Defendants owed Plaintiffs a general contractor's long-established tort duty to provide a safe workplace under the common work area doctrine. *Fultz* and *Loweke* do not bar this case.[30]

3. The Court of Appeals, reviewing the complete record, correctly assessed the fall risk.

Clark's argument that the Court of Appeals erroneously assessed and "generalized" the risk that caused Mr. Dancer's injuries rests on its premise that no other worker at the site faced any fall risk on the scaffold until Dancer himself "improperly placed planking while not wearing proper fall protection." (Clark application, p 29). This premise is not only patently false, but

[29] The "separate and distinct" issue is also unpreserved, since the trial court neither addressed it nor granted summary disposition on this basis. *Smit v State Farm Mut Auto Ins. Co*, 207 Mich App 674, 685; 525 NW2d 528 (1994).

[30] Clark's reliance on *Ghaffari v Turner Const Co (On Remand)*, 268 Mich App 460; 708 NW2d 44 (2005) in support of its argument that Defendants owed no separate and distinct tort duty is not only misplaced, but deliberately misleading. Following the Supreme Court's decision affirming summary disposition as to the general contractor (because the elements of the common work area doctrine were not met), on remand, the Court of Appeals considered the viability of the plaintiff's tort claim against subcontractor Guideline Mechanical only. *Id* at 462. The "separate and distinct" analysis in *Ghaffari* had nothing to do with a general contractor's liability under the common work area rule.

derives from Clark's deliberate omission, in violation of MCR 7.305(A)(1)(d) and the standard of review, of the mountain of admissible record evidence establishing that employees of several subcontractors (including electrician Koshurin) faced the same fall risk due to (a) use of planks that were unsupported by bridges/outriggers and unsecured, and (b) Defendants knowing failure to enforce fall-protection requirements.

Dancer and numerous other workers, including electrician Koshurin, faced the same serious risk due to the unsupported and unsecured planks.

Clark incorrectly argues that, as a matter of law, Mr. Dancer created a new risk of harm on August 9, 2010 not faced by other workers on the site that exclusively caused his injury. Overwhelming evidence, which Clark avoids, establishes that any alleged placement of the planks on the day of the accident did not alter the long-standing fall hazard created because the planks over the 8-10 foot gaps were never supported by bridges/outriggers and never secured. This is the identical hazard which caused electrician Koshurin to nearly fall two weeks before Dancer's accident. If Mr. Dancer created a totally new hazard, why did Koshurin nearly fall two weeks earlier due to unsecured and unsupported planks?

At the outset, whether Mr. Dancer improperly placed the planks and raised the scaffold before falling is a genuine issue of material fact. While Mr. Dancer does not remember the incident, he testifies that his job did not involve raising the scaffold. (Dancer dep 1, 20:10-20:23 – Ex R; Dancer dep 2, 29:14-29:16 – Ex N). Dancer's testimony is corroborated by the fact that he was not trained on Hydro Mobile equipment and was not designated as a competent person under EM 385 to inspect or operate the scaffolding. (Dancer dep 2, 20:11-21:8 – Ex N; Schaibly dep, 83:6-83:15 – Ex D; Stewart dep, 45:6-46:2 – Ex P; Kyewski dep, 48:10-48:16 – Ex K; EM 385, p 22-46, ¶¶ 22.N.14, 22.N.15 – Ex F).[31]

[31] Jim Schaibly admits that, on August 9, 2010, a "competent person," who was specifically trained on Hydro Mobile equipment, should have supervised Plaintiff while he was on the scaffold. (Schaibly dep, 83:6-83:15 – Ex C; see also Kyewski dep, 48:10-48:16 – Ex K).

The only witness contemporaneously present at the scene is Glenn Johnson. All the other witnesses Clark relies on did not observe Mr. Dancer's actions, the configuration of the planks before the accident, or his fall.[32] In citing Johnson's statements that Mr. Dancer moved the planks and raised the scaffold, Clark omits Johnson's contradictory testimony that that he merely "assume(s)" Mr. Dancer moved the planks for some purpose and does not know if Dancer raised the scaffold before he fell. (Johnson dep, pp 23:7-23:9, 79:8-79:12 – Ex M).[33] Clark further omits Johnson's testimony that, at the time of the accident, Mr. Dancer was not "moving" the planks, but was walking back and forth on the platform and stacking material to be down-loaded by Johnson's crane. (Id, 11:13-11:18, 12:5-12:18).

Assuming, arguendo, it is uncontroverted that Mr. Dancer moved the planks and raised the scaffold before he fell, the issues whether he was comparatively negligent for placement of the planks – or whether this constituted the sole cause of the accident – remain questions of fact for the jury.[34] Glenn Johnson specifically testifies that, at the time Mr. Dancer fell, there was no obvious opening in the unsecured overlapped planks that flipped up. (Johnson dep, 80:6-80:17,

[32] This includes Nick Martin and Brad Leidal, whose self-serving claims that, immediately after the accident and at the hospital, Mr. Dancer said he was "sorry" and that the accident was his "fault," are totally rebutted by witnesses confirming that Ronnie could not speak after the fall and by Dancer himself, who cannot recall the incident.

[33] As noted above, no admissible evidence supports Clark's allegation that Dancer must have moved the planks because he "encountered a clamp and a board used to establish the angle of the wall …." (See note 18, supra).

[34] It is universally-accepted that, unless reasonable minds could not differ, the issues of negligence, comparative negligence, proximate cause, and potential intervening cause are questions of fact for the jury. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004); *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002); *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999); *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). It is also well-established "that there can be more than one proximate cause contributing to an injury." *O'Neal v St John Hosp*, 487 Mich 485, 496-497; 791 NW2d 853 (2010).

90:7-90:18 – Ex M).[35] Even more, whether or not Mr. Dancer moved the planks does not alter the fact that, throughout this project, in direct violation of EM 385 and the Hydro Mobile manual, the planks were never secured or placed on proper Hydro Mobile bridges and outriggers. (EM 385, p 22-44, ¶ 22.N.01; p 22-6, ¶ 22.BV.08.(2).c; p 22-7, ¶ 22.B.08.(2).h – Ex F; Hydro Manual, p 74 – Ex L; Destafney dep, 45:25-46:3, 102:4-102:23 – Ex D; Kyewski dep, 53:11-53:25, 54:24-54:25, 55:4-55:22 – Ex K; Martin dep, 47:12-47:19 – Ex G; Koshurin dep, 17:20-17:22, 24:4-24:18 – Ex H; Schaibly dep, 77:14-77:18 – Ex C).[36] Both Schaibly and Destafney admit that the absence of extended outriggers across the entire span of the scaffold units created a visible hazard that Cory Hanson would have seen had he left his trailer and inspected the scaffold unit. (Schaibly dep, 163:22-164:20 – Ex C; Destafney dep, 49:24-50:3, 106:7-106:10, 107:6-107:13, 109:21-110:2 – Ex D). Further, it is unrebutted that, about two weeks before Mr. Dancer's accident, Eric Koshurin nearly fell off the same scaffold when an unsecured plank laid across one of the unsupported gaps raised up on him,[37] (Koshurin dep, 17:20-18:11, 18:2-18:11, 24:4-24:12, 53:16-53:19 – Ex H), and SSHO Hanson failed to act when Koshurin twice notified him of the hazard, (id, 18:14-18:24, 19:11, 19:17-19:19, 19:25-21:12, 21:8-21:17, 23:3-23:8,

[35] As demonstrated above, Clark mistakenly alleges that Plaintiffs' expert Wright concluded that Mr. Dancer created the hazard that caused his fall. (See note 19, supra).

[36] Defendants' representatives unequivocally admit it was their responsibility to enforce EM 385 and make sure the planks on the scaffold were secured. (Waterman dep, 8:4-8:13, 106:21-107:19, 109:4-109:8 – Ex A; Schaibly dep, 168:9-168:13 – Ex C). Cory Hanson himself admits that, if he observed that the scaffold planks were not secured and failed to enforce EM 385, he would have been "negligent." (Hanson dep, 129:7-129:21 – Ex B).

[37] In addition, Koshurin testifies that, when he nearly fell due to the unsecured planks, the scaffold was between 10 and 25 feet high. (Koshurin dep, 11:21-11:23, 12:3-12:12, 17:20-18:11, 21:8-21:17 – Ex H). Although, by the time Mr. Dancer fell, the scaffold had been raised to between 35 and 40 feet and the planks allegedly had been repositioned, (Schaibly dep, 31:18-31:24 – Ex C), the same hazardous condition created by the unsecured planks laid across the gaps remained unchanged. This establishes that Mr. Dancer did not create a new condition. As demonstrated below, it also establishes that, up to and after Mr. Dancer's accident, the scaffold remained a common work area with the same hazard and fall risk.

23:11-23:15 – Ex H; Martin dep, 60:6-60:11, 114:21-114:24 – Ex G).[38] There is absolutely no evidence that the planks had been "improperly placed" when Koshurin nearly fell. It is also uncontested that Koshurin nearly fell over one of the same gaps through which Mr. Dancer fell. This again raises the question if, as Clark argues, the operative fall risk did not exist until Mr. Dancer allegedly moved the planks on August 9, 2010, why did Koshurin nearly fall, two weeks earlier, due to the same deficiencies in the scaffold?

Clark conspicuously omits the testimony of its own superintendent and expert, as well as Leidal & Hart employees, establishing that Defendants' failure to enforce the project's scaffold safety requirements was a proximate cause of the accident. Superintendent Schaibly admits that Clark and BBCS share "responsibility" and were "a cause" of Plaintiff's injury. (Schaibly dep, 143:9-143:25, 168:9-168:20 – Ex C). In addition, defense expert Destafney, Leidal & Hart safety director Kyewski, and Glenn Johnson all establish that the absence of bridges and outriggers (which Leidal & Hart owned and could have readily installed) and devices to secure the loose planks (which took very little time and effort to do), was a proximate cause of Mr. Dancer's fall. (Destafney dep, 77:12-77:18, 105:5-106:6, 106:7-107:13 – Ex D; Kyewski dep, 53:11-53:25, 54:24-54:25, 55:4-55:22 – Ex K; Johnson dep, 94:1-94:3 – Ex M).[39]

With this, none of Clark's arguments establish that the Court of Appeals improperly assessed the risk. Plaintiffs agree that the common work area rule requires that a significant number of workers be exposed to the same risk that injured the plaintiff. Clark's reliance on *Hughes v PMG Building, Inc*, 227 Mich App 1; 574 NW2d 691 (1997) and *Smith v BREA Prop Mgmt*, 490 Fed Appx 682 (CA 6, 2012) as authority that, as a matter of law, other site workers

[38] Clark's efforts to dismiss Koshurin's testimony about his previous near fall, with arguments like he was "young and inexperienced," (Clark application, pp 35-37, and note 6), are patently improper in a summary disposition appeal.

[39] Destafney specifically concedes that use of the scaffolding without bridges and outriggers over the gaps created a fall danger and risk (or high degree of risk) of injury to anyone higher than six feet. (Destafney dep, 105:5-106:6 – Ex D).

did not face the same risk as Dancer, is misplaced. *Hughes* held that other workers were not exposed to the same risk because they never worked up on the porch overhang that collapsed. *Id*, 227 Mich App at 6-7. *Smith* found that other workers were not exposed to the same hazard because there was no risk the scaffold would collapse until employees of only one subcontractor tried to install a tarp that pulled away from the wall "like a big sail." *Id*, 490 F Appx at 683, 686. In sharp contrast to *Hughes* and *Smith*, employees of several subcontractors, including Koshurin, faced the same risk as Mr. Dancer – erection and use of the scaffold with planks unsupported by outriggers over the gaps and unsecured. This is not merely Plaintiffs' "spin." It is a fact proven through the admissions of Defendants' own representatives and expert.

Clark's argument that the scaffold was not hazardous before Dancer's injury because MIOSHA did not require securing of the planks is unavailing. To begin, Clark completely ignores the fact that the planks over the gaps were not only unsecured, but needlessly and dangerously unsupported by bridges and outriggers. Clark fails to cite any evidence or authority excusing Defendants' failure to require installation of outriggers for the planks to rest on. Clark also omits Eric Koshurin's testimony that overlapping alone across the gaps was not sufficient to prevent the planks from shifting or flipping. (Koshurin dep, 24:13-24:18 – Ex H).

Moreover, as demonstrated above, EM 385 and the Hydro Mobile manual, and not MIOSHA's minimal requirements, governed this worksite. In citing Nick Martin's testimony that MIOSHA governed, Clark disingenuously omits the uncontested fact that, in addition to other egregious negligent acts, Defendants never bothered to give Martin EM 385 or enforce its requirements. (See above). Clark additionally relies on the fact that MIOSHA cited Leidal & Hart after the accident, while omitting (a) the fact that Defendants never identified Dancer's employer as a nonparty and fault, and (b) investigator Schaibly's testimony that the citations in no way exonerated the general contractors or prohibited contractual applicability of site-safety guidelines more stringent than MIOSHA. (Stewart dep, 11:22-11:25, 38:5-38:15, 41:2-41:12,

44:1-44:20, 46:6-46:10 – Clark Appx P). To reiterate, Clark fails to cite a shred of authority rejecting applicability of contractual guidelines in a common work area case.[40]

Defendants did not enforce fall protection, which Mr. Dancer was not required to use at the time he fell.

Clark spuriously argues that the Court of Appeals erroneously failed to hold Mr. Dancer solely responsible for not wearing fall protection. It is undisputed that fall protection was not required while workers were walking on the scaffold platform enclosed by the guardrails. (Stewart dep, 43:8-43:11 – Ex P; Martin dep, 112:4-112:10 – Ex G; Kyewski dep, 74:7-75:21 – Ex K; Johnson dep, 40:23-41:5 – Ex M). Glenn Johnson specifically testifies that, at the time he fell, Mr. Dancer was walking on the platform within the closed guard rails. (Johnson dep, 11:2-11:7, 12:5-12:13, 23:10-23:15, 24:11-24:16, 29:20-30:5, 109:16-110:10 – Ex M).

Even if, contrary to all of the above-cited admissible evidence, Mr. Dancer should have been wearing fall protection, Plaintiffs have raised a notably meritorious claim that Defendants negligently failed to enforce the six-foot fall protection requirement of EM 385. (EM 385, p 21-1 ¶ 21.A – Ex F).[41] As outlined above, substantial evidence redundantly proves that Defendants, despite knowing that workers climbed and used the scaffolding without wearing fall protection devices, utterly failed to enforce the EM 385 rule. (Schaibly dep, 77:6-77:13 – Ex C; Koshurin dep, 10:17-10:24, 11:3-11:5, 12:18-12:24, 13:16-13:20 14:13-14:17 – Ex H; Allen dep, 38:13-38:23 – Ex I; Johnson dep, 99:2-99:9 – Ex M). Whether it was necessary for Mr. Dancer to wear fall protection at the time of his fall, or whether his failure to wear fall protection was his own

[40] Clark's complaint that the Court of Appeals held that planking in every Michigan construction site must be secured is preposterous. (Clark application, p 29). Planking had to be secured in this case, not because the Court of Appeals engaged in judicial activism, but because the parties contracted for this requirement. The parties could have agreed to follow MIOSHA, or any other standards. As established above, Clark also spuriously asserts that securing devices would have created a trip hazard. (See supra, p 11 and note 8).

[41] There is also evidence, which Clark omits, that Mr. Dancer had no viable location to attach a lanyard. (See note 20, supra).

fault or was attributable to Defendants' negligence, are jury questions. The Court of Appeals did not improperly assess the risk of harm.[42]

4. Defendants did not "take reasonable steps" to enforce safety.

Clark's attempt to disavow Defendants' egregious negligence is manifestly absurd. Evidence of Defendants' negligence, outlined above, is overwhelming. Instead of fulfilling their obligation to enforce safety, managers like SSHO Hanson and Mike Shekaski hung out in their trailers looking for other jobs; running marijuana, car-rental and real estate businesses; and staging Texas hold 'em tournaments. Clark's claim that Defendants' offered "a safe work environment" to Dancer and the many other workers using the scaffold is vexatious. (Clark application, p 33).

Clark's allegation that, as a matter of law, Defendants can't be liable because the "danger only existed for minutes and could not be seen from the ground," (id, p 32), improvidently disregards the voluminous evidence proving that the absence of bridges/outriggers and secured planks (along with their knowing failure to enforce fall protection rules) constituted a visible hazard faced by a significant number of workers – including Koshurin and Dancer.

B. <u>The Court of Appeals correctly held that evidence raises a genuine issue of material fact satisfying the elements of the common work area doctrine</u>.

Finally turning to the actual issue in this appeal, Clark incorrectly argues that Plaintiffs have not met "any" of the elements of the common work area doctrine. Ample evidence raises a material fact question meeting the each element of the rule. The Court of Appeals correctly reversed the summary disposition order. Clark's application for leave should be denied.

---

[42] Contrary to Clark's misleading presentation, *Latham v Barton Malow Co*, 480 Mich 105, 114; 746 NW2d 868 (2008) did not excuse their liability in this case. *Latham* specifically recognized that "the danger of *working at heights without fall-protection equipment*" is actionable. *Id* (original emphasis). The dangerously constructed scaffold was not a safe, fall-protecting platform. *Latham* also establishes that Defendants are potentially liable for not enforcing fall-protection requirements.

1. Clark conceded below that Defendants exercised supervisory and coordinating authority over safety at the entire site, including the scaffolding.

Clark's challenge to the first element of the common work area doctrine is vexatious. In the trial court, Clark conceded, and therefore waived, the issue that Defendants exercised supervisory and coordinating authority over safety at the Ft. Custer site. (BBCS MSD; Clark MSD; 9/3/14 opinion & order, p 3 – Clark Appx 3); *People v Szalma*, 487 Mich 708, 725; 790 NW2d 662 (2010). Ample evidence, outlined above, conclusively proves this fact.

2. The trial court correctly held that evidence raises a meritorious fact question that Defendants failed to take reasonable steps within their supervisory and coordinating authority to guard against the readily observable and avoidable dangers of the scaffold's construction and use without fall protection devices.

Continuing to argue that, as a matter of law, Mr. Dancer created a previously non-existent fall hazard shortly before his fall, Clark challenges the second, "readily observable and avoidable danger" element. *Latham*, *supra*, 480 Mich at 109. The trial court correctly held that Plaintiffs have raised a material fact question satisfying this element. (9/3/14 opinion & order, p 3 – Clark Appx 3)

Overwhelming evidence, outlined above, establishes that Leidal & Hart's failure to install bridges and outriggers supporting planks in the 8 to 10 foot gaps between the Hydro Mobile units, and failure to secure the planks laid across those gaps, remained an operative, readily-observable and avoidable danger. It is also unrebutted that, before Mr. Dancer's accident, electrician Koshurin (a) nearly fell from the scaffold due to the same hazard when an unsecured plank over one of the gaps Dancer fell through rose up and (b) twice notified SSHO Hanson of the hazard. (Koshurin dep, 18:14-18:24, 19:25-21:2 – Ex H). Despite Koshurin's repeated notice, up to the time of Plaintiff's fall, Defendants did not require Leidal & Hart, pursuant to EM 385 and the Hydro Mobile manual, to install bridges/outriggers and secure the planks laid

across the gaps. (Id, 23:11-23:15). Finally, there is substantial evidence that, if Mr. Dancer had been required to use fall protection at the time of his fall, Defendants knew subcontractors were not using fall protection on the scaffold and failed to enforce the requirement.

While Defendants may convince the jury that, despite Koshurin's prior incident, Mr. Dancer improperly positioned the planks and created an entirely new risk that solely caused his accident, compelling evidence – proving that use of unsecured planks unsupported over the gaps by bridges and outriggers, and Defendants' systemic failure to enforce fall-protection, was a proximate cause of Dancer's accident – precludes summary disposition.

3. Ample evidence raises a genuine issue of material fact that a significant number of workers were exposed to the same risk that caused Plaintiff's fall.

The Court of Appeals correctly ruled that Plaintiffs have raised a material fact question that a significant number of workers were exposed to the same rise that caused Mr. Dancer's fall. Clark has failed to demonstrate that this decision was erroneous or warrants review.

Michigan courts have not specified what constitutes a "significant number of workers" for purposes of the common work area rule. *Shepard v M & B Construction, LLC*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2006 (Docket No. 261484) (Ex Y, p 3, *4). While cases have held that one or four persons is not a "significant number of workers," see *Ormbsy v Capital Welding, Inc*, 471 Mich 45, 59 n 12; 684 NW2d 320 (2004) (one worker insufficient); *Hughes v PMG Building, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1997) (four is insufficient), they also have held that the presence of eight or more employees raises a genuine issue of material fact satisfying the "significant number of workers" element, *Shepard, supra* (8 to 10 workers raises a material fact question); *Latham, supra*, 480 Mich at 121 (approximately a dozen individuals raises a material fact question).

It is unrebutted that at least fifteen employees of several contractors used the scaffold and were exposed to the same risk of the unsecured planks laid across the 8-10 foot gaps. Weston

Allen testifies that "everyone in the trailer knew that all trades were using scaffolding." (Allen dep, 36:19-36:22; emphasis added – Ex I). These subcontractors included: Leidal & Hart, who consistently had between eight and eleven workers on the scaffold, (Martin dep, 74:8-74:20 – Ex G; Kyewski dep, 46:5-46:10 – Ex K; Johnson dep, 13:16-14:11, 17:21-18:1 – Ex M; Dancer dep 1, 18:23-19:2 – Ex R);[43] Henry Electric, with two workers "regularly" and "frequently" working alongside the masons on the scaffold. (Hanson dep, 152:19-152:24, 178:5-178:20 – Ex B; Schaibly dep, 74:4-74:23 – Ex C; Koshurin dep, 7:7-7:8, 9:11-10:16, 13:4-13:11 – Ex H; Allen dep, 7:16-9:13 – Ex I); at least one employee from another electrical subcontractor, "Mark Shepherd's company," (Allen dep, 10:1-10:7, 38:1-38:24 – Ex I); the crew from Szydlowski Plumbing, (id, 5:2-7:3, 6:18-6:21, 37:4-37:7, 54:5-55:1; Koshurin dep, 14:25-15:2 – Ex H);[44] pipefitters (or "ironworkers"), (Johnson dep, 112:16-112:25, 113:7-113:9, 122:11-122:15 – Ex M; Schaibly dep, 74:20-75:3 – Ex C); caulkers, (Koshurin dep, 24:19-24:22, 46:23-47:1 – Ex H), as well as representatives of Clark, (Johnson dep, 112:5-112:11, 119:14-119:21 – Ex M), and the Army Corps, (Koshurin dep, 15:3-15:8, 52:20-53:1 – Ex H). Aside from the electricians and plumbers, the heating and cooling contractors were scheduled to work at high elevations after Plaintiff's accident. (Allen dep, 53:11-54:4 – Ex I; Schaibly dep, 75:7-75:24 – Ex C).

By the most conservative count, over 15 employees of at least five subcontractors (Leidal & Hart, Henry Electric, Shepherd Electric, Szydlowski Plumbing and the heating and cooling contractor) worked on the scaffolding. If, as Clark Superintendent Schaibly testifies, there were approximately 50 workers on the entire site, (Schaibly dep, 153:22-154:7 – Ex C), approximately one third of the entire work force used the scaffolding. Since it is undisputed that Leidal & Hart

[43] On the morning of Dancer's accident, there were "approximately 10 masons … on the scaffolding ….." (8/10/10 memo – Ex T).

[44] Mr. Allen did not specify the number of plumbers that worked on the scaffold, but used the word "we" when describing his crew that was up there. (Allen dep, 37:7, 54:3-54:4 – Ex I). From this, there had to be at least two plumbers on the scaffolding.

never installed bridges/outriggers over the gaps and never secured the planks, and Defendants never enforced fall-protection rules, this is more than enough to raise a genuine issue of material fact meeting the third element that a significant number of workers were exposed to the same risk that proximately caused Ronnie Dancer's injuries.

Despite this evidence, Clark argues that Mr. Dancer created and was the only worker to encounter the risk of harm that caused his fall. At inception, Clark dismisses, with misplaced credibility arguments, electrician Koshurin's testimony that there were "other laborers" on the scaffold at the time of the accident. (Koshurin dep, 73:2-73:8 – Ex H).

Even if Mr. Dancer was the only person on the scaffold when he fell, this does not change the fact that at least 15 employees of multiple subcontractors used the scaffold and were exposed to the same risk posed by the unsecured planks placed over the 8-10 foot open gaps – including Eric Koshurin, who previously nearly fell for the same reason as Mr. Dancer.[45] This definitively satisfies the requirement of a "high degree of risk to a significant number of workers." Once again, the issues of Dancer's alleged comparative negligence and proximate cause are fact questions for the jury – particularly given the testimony of several witnesses, including superintendent Schaibly and defense expert Destafney, that the unsupported and unsecured planks, coupled with unenforced fall-protection, were visible, operative hazards and a cause of the accident. Clark's jury trial arguments about the credibility of witnesses, comparative negligence and causation in no way entitle Defendants to summary disposition.

[45] Koshurin testifies that, when he nearly fell due to the unsecured planks, the scaffold was between 10 and 25 feet high. (Koshurin dep, 11:21-11:23, 12:3-12:12, 17:20-18:11, 21:8-21:17 – Ex H). Although, by the time Mr. Dancer fell, the scaffold had been raised to between 35 and 40 feet and the planks allegedly had been repositioned, (Schaibly dep, 31:18-31:24 – Ex C), the same hazardous condition created by the unsecured planks laid across the gaps unsupported by outriggers remained unchanged. This establishes that Mr. Dancer did not create a new condition other workers previously did not encounter. As demonstrated below, it also establishes that, up to and after Mr. Dancer's accident, the scaffold remained a common work area with the same hazard and fall risk.

Finally, Clark misconstrues footnote 12 from *Ormsby, supra*,[46] as limiting assessment of nature of the risk to the precise time Dancer fell. As courts have correctly explained, determination of the common work area doctrine is not limited to a "snapshot" of the exact time the plaintiff is injured, but the length of time the same risk of harm existed. *Richter v American Aggregates Corp*, 522 F Appx 253, 262-263 (CA 6, 2013) (Ex Z); ("[I]t follows from *Ormsby* and its predecessors that the relevant time is the time period during which the hazardous activity is occurring or will occur—whether it lasts one hour, one day, or for the duration of a particular construction stage. … The length of the relevant time period is defined by the continued existence of the same risk of harm in the same area."); *Latham v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2014 (Docket Nos. 312141, 313606), lv den after MOA, 497 Mich 993 (2015) (Ex W, pp 7-8).

Richter, *Latham*, and the cases they cite establish that determination of whether a significant number of workers were exposed to the same risk of harm is not limited to the precise time of Plaintiff's injury, but to how long the risk actually existed.[47] Since it is uncontested that Leidal & Hart continued to use the Hydro Mobile scaffolding without bridges/outriggers over the gaps and without securing the planks, and that Defendants failed to enforce fall-protection, Plaintiffs have raised a meritorious fact question that a significant number of workers, including,

[46] Stating that "[t]he high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Id*, 471 Mich at 59 n 12.

[47] Acceptance of the trial court's application of the *Ormsby* footnote would lead to absurd results. If, for example, twenty workers had just left a common work area and, as the plaintiff was departing, he or she was injured, by the trial court's reasoning, the common work area rule does not apply because a significant number of workers were not in the area at the exact time of the accident. Or, as in this case, although approximately ten workers had just been on the scaffold earlier that morning, because Mr. Dancer may have been the sole remaining worker when he fell, by the trial court's reasoning, the elements of the common work area doctrine are not met. This makes absolutely no sense. This harsh limitation of the rule also undermines the strong public policy basis for the common work area rule. *Ghaffari, supra*, 473 Mich at 20-21.

of course, electrician Koshurin, were exposed to the same rise that was a proximate cause of Ronnie Dancer's fall.[48]

The Court of Appeals correctly held that Plaintiffs have raised a material fact question that a significant number of workers were exposed to the same risk of harm that caused Ronnie Dancer's accident. Clark fails to raise meritorious grounds for Supreme Court review.

4. The Court of Appeals correctly held that there is a material fact question that the scaffold was a common work area at the time of Mr. Dancer's accident.

As the Court of Appeals correctly held, substantial evidence establishes that, both before and after the accident, employees of multiple subcontractors worked on the scaffolding well above six feet and therefore encountered the same serious fall risk caused by the unsecured planks laid across the gaps and non-enforcement of fall protection. A genuine issue of material fact meeting the fourth element that the scaffold was a common work area at the time of the accident accordingly precludes summary disposition.

Michigan law is clear that an area "where the employees of two or more subcontractors will eventually work" constitutes a common work area. *Groncki v Detroit Edison Co*, 453 Mich 644, 663; 557 NW2d 289 (1996). "It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area." *Hughes v PMG Building, Inc*, 227 Mich App 1, 5-6; 574 NW2d 691 (1997).

As Plaintiffs have shown, it is unrebutted that, before and after the accident, a total of at least 15 employees of multiple subcontractors (Leidal & Hart, Henry Electric, Shepherd Electric, Szydlowski Plumbing, and the heating and cooling contractor) worked on the scaffolding and

[48] *Felty v Skanska USA Building, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2011 (Docket No. 297991) (Clark Appx 30), on which the trial court and Defendants have extensively relied, sharply contrasts this case. In *Felty*, "only two" employees of one subcontractor "were exposed to the risk," *id*, slip op at 2, not at least 15 as in this case.

faced the same fall risk created by the unsecured planks over the 8-10 foot gaps. Clark mistakenly argues, and the trial arbitrarily concluded, that the scaffold ceased being a common work area during the week[49] before the accident when Leidal & Hart worked above 20 feet.[50]

In *Ormsby*, *supra*, the Supreme Court adopted the Court of Appeals' analysis from *Hughes*, *supra*, "[w]ith reference to element four – a common work area," that "[w]e thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard." *Ormsby*, *supra*, 471 Mich at 57 n 9, quoting *Hughes*, *supra*, 227 Mich App at 8-9 (emphasis added). The Supreme Court was clear that the crucial factor in determining whether a common work area exists is not the precise location of an accident, but whether employees of more than one subcontractor were subject to "the same risk or hazard."

The trial court's and Defendants' attempt to distinguish use of the scaffold above and below 20-25 feet was arbitrary and patently untenable. Every worker on the scaffold above six feet, and certainly up to 20-25 feet, faced the "same" serious fall risk as Mr. Dancer at 35 to 40 feet. Eric Koshurin's near fall at 10-25 feet due to the unsecured planks laid over a gap without outriggers, and Mr. Dancer's fall at 35-40 feet due to the unsecured planks laid over a gap without outriggers, conclusively proves that, even though the scaffold's elevation changed, the risk of harm faced by all the workers remained the "same." The "area" remained the same, improperly constructed scaffold.

---

[49] Mr. Koshurin testified he was up on the scaffold at this same wall a half a week or a week before Mr. Dancer fell. (Koshurin dep, 41:20-41:25, 43:5-43:7, 44:4-44:11, 54:17-54:19, 88:2-88:5, 91:6-91:12 – Ex H).

[50] Actually, Eric Koshurin testifies that he worked on the scaffold at elevations of 20-25 feet. (Koshurin dep, 11:21-11:23, 12:3-12:12 – Ex H). The trial court incorrectly found that no other subcontractor worked above 20 feet.

28% of all construction site falls involve scaffolding, floor openings or open-sided floors. Culver, C & Connolly, C, *Prevent Fatal Falls in Construction, Safety + Health*, pp 72, 73 (September 1994). This is why EM 385, Section 22, devotes entire subsections to scaffolds, mast climbing work platforms, and planking. This is also why EM 385 set "**[t]he fall protection threshold height requirement"** for the entire project at **"6 ft. (1.8 m)."** (EM 385, p 21-1 ¶ 21.A; original emphasis – Ex F). It is uncontested that regulations on this project, including EM 385, mandated 100% fall protection above six feet. (Martin dep, 23:5-23:8 – Ex G; Leidal dep, 67:19-67:24 – Ex J; Johnson dep, 54:13 – Ex M). Defendants' expert, Tom Destafney, acknowledges that any fall from six feet or higher can cause significant injury. (Destafney dep, 88:15-88:24, 105:5-106:15 – Ex D). Clark superintendent Schaibly concedes that, even below elevations of 25 to 30 feet, the "red flag" of a serious fall risk "goes up and you need to be on high alert." (Schaibly dep, 50:14-50:22 – Ex C).

The unrebutted fact that numerous employees of more than one subcontractor worked on the scaffold above six feet and encountered the same hazard and fall risk created by the unsecured and unsupported planks raises a genuine issue of material fact that the scaffold constituted a common work area – including at the time of Mr. Dancer's accident. This is not a case, such as Clark's cited *Sprague v Toll Bros*, 265 FSupp2d 792, 800 (ED Mich, 2003), where an area ceased to be common area by the time of the plaintiff's accident. In the instant claim, it is uncontested that this scaffold still had to be used to construct two remaining walls at the site and that, after Plaintiff's accident, employees of more than one subcontractor (masons, plumbers, electricians, heating and cooling workers) would continue to use it. (Koshurin dep, 25:17-25:18, 39:6-39:9 – Ex H; Allen dep, 7:16-8:15, 9:7-9:13, 54:3-54:4 – Ex I; Schaibly dep, 75:7-75:24 – Ex C).

None of Clark's arguments alter the fact that Plaintiffs have satisfied the fourth element of the common work area doctrine.[51] Evidence raises a material fact question that, before and after this accident, employees of two or more subcontractors worked on the scaffold at mandatory fall-protection elevations and faced a serious fall risk. The Court of Appeals correctly reversed the summary disposition order.

C. The Court of Appeals' decision did not step toward "imposing strict liability on general contractors for all hazards on construction sites."

The majority's decision, after properly considering the complete record in the light most favorable to Plaintiffs, merely held that evidence raises a material fact question satisfying the established elements of the common work area doctrine. Contrary to Judge Wilder's dissent, the majority decision did not come close to "imposing strict liability on general contractors for all hazards on construction sites." (Dissent, p 2 – Clark Appx 2).

It was Defendants, and not the Court of Appeals, who contractually agreed to be bound by the more stringent requirements of EM 385 and the Hydro Mobile manual. Absolutely nothing in the Court of Appeals' decision precludes general contractors from contracting for workplace safety standards no more rigorous than MIOSHA. It was also Defendants who – after undertaking their duty to oversee and coordinate safety on the site; knowing that the planks on the scaffold were not never supported by bridges/outriggers in the gaps and were never secured; knowing that Leidal & Hart never enforced fall-protection requirements on the scaffold above six feet; and receiving repeated prior notice of electrician Koshurin's near catastrophic fall – permitted (as SSHO Hanson languished in his trailer looking for other jobs and working as a drug dealer) the same hazard to continue until Ronnie Dancer was catastrophically injured. The Court of Appeals has not subjected Defendants to "strict liability."

[51] This includes, as demonstrated above, Clark's false assertion that Leidal & Hart exercised exclusive control over the scaffold.

Clark has failed to present meritorious grounds for Supreme Court review. This is a standard, fact-intensive, non-jurisprudentially significant MCR 2.116(C)(10) appeal. Clark's application for leave to appeal should be denied.

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Appellees respectfully request that this Honorable Court deny Defendant-Appellant, Clark Construction Company, Inc's, application for leave to appeal.

Respectfully submitted,

/s/ Donald M. Fulkerson
DONALD M. FULKERSON (P35785)
Attorney of Counsel for Plaintiffs-Appellees
P.O. Box 85395
Westland, MI 48185
(734) 467-5620
donfulkerson@comcast.net

Dated: August 5, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

RONNIE DANCER and ANNETTE DANCER,

Plaintiffs-Appellees,

v

CLARK CONSTRUCTION COMPANY, INC., a Michigan corporation, and BETTER BUILT CONSTRUCTION SERVICES, INC., a foreign corporation

Defendants-Appellants.

Supreme Court No. 153830

Court of Appeals No. 324314

Kalamazoo County Circuit Court No. 2012-0571-NO

/

DONALD M. FULKERSON (P35785)
Attorney of Counsel for Plaintiffs-Appellees
PO Box 85395
Westland, MI 48185
(734) 467-5620
donfulkerson@comcast.net

DAVID A. PRIEHS (P39606)
Law Offices of David A. Priehs
Attorney for Plaintiffs
30300 Northwestern Hwy, First Floor
Farmington Hills, MI 48334
(248) 932-0100
dap@dpriehspc.com

NATHAN PEPLINSKI (P66596)
Harvey Kruse, PC
Attorneys for Defendant Clark Const
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
npeplinski@harveykruse.com

TYREN R. CUDNEY (P46638)
RON W. KIMBREL (P32786)
Lennon, Miller, O'Connor & Bartosiewicz, PLC
Attorneys for Defendant Better Built
151 S. Rose Street, Suite 900
900 Comerica Building
Kalamazoo, MI 49007
(269) 381-8844
tcudney@lennonmiller.com
rkimbrel@lennonmiller.com

/

PROOF OF SERVICE

Donald M. Fulkerson, by his signature, verifies that, on August 5, 2016, via e-service through the Supreme Court's TrueFiling system, he served a complete copy of Plaintiffs-Appellees' answer to Defendant-Appellant Clark Construction Company, Inc's application for

leave to appeal, including volumes 1 and 2 of the exhibits thereto, and this proof of service on Nathan Peplinski at npeplinski@harveykruse.com (1050 Wilshire Drive, Suite 320, Troy, MI 48084); and Tyren R. Cudney/Ron W. Kimbrel at tcudney@lennonmiller.com/ rkimbrel@lennonmiller.com (151 S. Rose Street, Suite 900, 900 Comerica Building, Kalamazoo, MI 49007).

/s/ Donald M. Fulkerson
Donald M. Fulkerson

Dated: August 5, 2016